American Bar Association Journal

June 1953

VOLUME 39 • NUMBER 6

Diamond Jubilee Meeting . . . Boston . . . August 23-28

Contents

JUNE, 1953

THE AMERICAN BAR ASSOCIATION JOURNAL is published monthly by the AMERICAN BAR ASSOCIATION at 1140 North Dearborn Street, Chicago 10, Illinois.
Entered as second class matter August 25, 1920, at the Post Office at Chicago, Illinois, under the act of August 24, 1912.
Price per copy, 75c; to members, 50c; per year, $5.00; to Members, $2.50; to Students in Law Schools, $3.00;
to Members of the American Law Student Association, $1.50.
Vol. 39, No. 6. Changes of address must reach the JOURNAL office five weeks in advance of the next issue date. Be sure to give both old and new addresses.

The President's Page

Robert G. Storey

■ Judicial salaries and, indeed, salaries of public servants generally, are entirely too low. In a period of spiraling prices, salaries of public officials tend to lag far behind salary levels generally. It takes time to obtain legislative action required for salary boosts.

The Assembly of the American Bar Association in September, 1949, adopted a resolution urging Congress to make effective the recommendation of the Hoover Commission which called for increases in salaries of officials in the executive branch of the Federal Government and also increases for members of the legislative and judicial branches. Congress has provided substantial increases in the salaries of the major executive officers but no increase has been granted members of Congress or of the judiciary in recent years.

It was my pleasure recently to meet with the Committee on Judicial Selection, Tenure and Compensation, of which Morris B. Mitchell, of Minneapolis, is Chairman, and I was much impressed with the factual data assembled by that Committee relating to measures pending in Congress for increase of congressional and judicial salaries. The House of Delegates of the American Bar Association in 1949, and again in 1951, recommended appropriate legislation by Congress providing for increases in federal judicial salaries commensurate with the increase in the cost of living, including the depletion in incomes by taxation. The evidence now available points clearly to necessity for substantial increases in salaries of members of the legislative and judicial departments of the Federal Government, and I hope that favorable action is soon taken upon pending measures for that purpose.

Members of Congress, under present salary scales, receive $12,500 a year and a $2,500 expense allowance. It is impossible to maintain an establishment in Washington and a home elsewhere, and meet all the social responsibilities of the office, on any such income. Yet we ask, and expect, our Congressmen to pass upon colossal issues, involving appropriations of billions of dollars and having untold effect upon the welfare of this nation. It is absurd to demand the highest quality public servant in the halls of Congress and offer to pay him a salary inadequate to maintain the responsibilities of that office. Every member of Congress must supplement his congressional income. Some engage in public speaking or writing; others try to keep up a business. Whatever they do takes from the time which they otherwise could, and would, devote to the public service for which they were elected.

As the safety of the nation is entrusted to the elected representatives of the people, so the protection of individual rights and liberties is entrusted to the judges who serve upon the nation's courts. Chief Justice Marshall said: "The judicial department comes home in its effects to every man's fireside; it passes on his property, his reputation, his life, his all." The men who assure the fair and effective functioning of the judicial department are the men upon the Bench. Mr. Justice Sutherland remarked once that "if the political structure erected by the fathers rests upon any one pillar more securely than upon another, it is upon that which upholds the right of the individual to invoke the judgment of the civil courts of the land upon his conduct". Judges frequently decide controversies involving vast sums of money, but far more important than that is the protection they afford to all the people of the land in respect to their rights of life, liberty and property under the Constitution of the United States. Leaders of the profession must be drawn into the judiciary. How can this be assured when to put on judicial robes usually means to lop off the major part of one's income?

These considerations apply with equal force to judicial salaries paid by most of our state governments, although it is true that in at least four states the judges of the courts of last resort receive more salary than the members of the Supreme Court of the United States. I do not believe that anyone would contend that these state salaries are too high. It ought to be obvious to everyone that the salaries of the Justices of the Supreme Court of the United States are very much too low.

There is a constant attrition in the judiciary because of resignations on account of inadequate compensation. No judicial system can be sufficient to its purposes unless its judges have adequate compensation, permanent tenure and sound provisions for retirement.

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1953

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The Seventy-Sixth Annual Meeting of the American Bar Association will be held in Boston, August 23 to 28, 1953. Further information with respect to the schedule of meetings will be published in forthcoming issues of the *Journal*.

Attention is called to the fact that many interesting and worthwhile events of the Meeting will be arranged, as usual, to take place on Saturday and Sunday, August 22 and 23, preceding the opening sessions of the Assembly and House of Delegates, August 24.

Requests for hotel reservations should be addressed to the Reservation Department, American Bar Association, 1140 North Dearborn Street, Chicago 10, Illinois, and should be accompanied by payment of $10.00 registration fee for *each lawyer* for whom reservation is requested. **Be sure to indicate *three* choices of hotels, and give us your definite date of arrival, as well as probable departure date.**

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American Bar Association Journal

the official organ of the

AMERICAN BAR ASSOCIATION

published monthly

The objects of the American Bar Association, a voluntary association of lawyers of the United States, are to uphold and defend the Constitution of the United States and maintain representative government; to advance the science of jurisprudence; to promote the administration of justice and the uniformity of legislation and of judicial decisions throughout the nation; to uphold the honor of the profession of law; to apply its knowledge and experience in the field of the law to the promotion of the public good; to encourage cordial intercourse among the members of the American Bar; and to correlate and promote such activities of the Bar organizations in the nation and in the respective states as are within these objects, in the interest of the legal profession and of the public. Through representation of state, territory and local bar associations in the House of Delegates of the Association, as well as large membership from the Bar of each state and territory, the Association endeavors to reflect, so far as possible, the objectives of the organized Bar of the United States.

There are seventeen Sections for carrying on the work of the Association, each within the jurisdiction defined by its by-laws, as follows: Administrative Law; Antitrust Law; Bar Activities; Corporation, Banking and Business Law; Criminal Law; Insurance Law; International and Comparative Law; Judicial Administration; Labor Relations Law; Legal Education and Admissions to the Bar; Mineral Law; Municipal Law; Patent, Trade-Mark and Copyright Law; Public Utility Law; Real Property, Probate and Trust Law; Taxation; and the Junior Bar Conference. Some issue special publications in their respective fields. Membership in the Junior Bar Conference is limited to members of the Association under the age of 36, who are automatically enrolled therein upon their election to membership in the Association. All members of the Association are eligible for membership in any of the other Sections.

Any person who is a member in good standing of the Bar of any state or territory of the United States, or of any of the territorial groups, or of any federal, state or territorial court of record, is eligible to membership in the Association on endorsement, nomination and election. Applications for membership require the endorsement of a member of the Association in good standing and are considered in each case by a Committee on Admissions of the appropriate state. If the applicant is a member of the Bar of the state or territory in which he resides or has his principal office, or is a member of a federal, state or territorial court of record of a state or territory in which he resides or has his principal office, the application is referred to the Committee on Admissions for one of such states or territories. If, however, the applicant is not a member of the Bar of the state or territory in which he resides or has his principal office, the application is referred to the Committee on Admissions for one of those states or territories or is referred to the Committee on Admissions for a state or territory in which the applicant formerly resided and to the Bar of which he was admitted. Upon the approval of an application by a majority of the proper Committee on Admissions, an applicant is deemed nominated for membership. All nominations made pursuant to these provisions are reported to the Board of Governors for election. Four negative votes in the Board of Governors prevent an applicant's election.

Dues are $16.00 a year, except for the first two years after an applicant's admission to the Bar, the dues are $4.00 per year, and for three years thereafter $8.00 per year, each of which includes the subscription price of the JOURNAL. There are no additional dues for membership in the following sections: Bar Activities, Criminal Law, Judicial Administration, Legal Education and Admissions to the Bar, and the Junior Bar Conference. Dues for the Section of Administrative Law, the Section of Antitrust Law, the Section of Labor Relations Law and the Section of Patent, Trade-Mark and Copyright Law are $5.00 a year; dues for the Section of Taxation are $6.00 a year; dues for all other Sections are $3.00 a year.

Blank forms of proposal for membership may be obtained from the Association offices at 1140 North Dearborn Street, Chicago 10, Illinois.

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RECENT LEGAL NOTES

American
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★
June 1953

• State taxes and out-of-state sellers

The highest court of Maryland recently upheld the seizure of a Delaware seller's delivery truck as a means of forcing him to collect the state's use tax on the property delivered within the state [*Miller Bros.*, Md. Ct. App., March 11, 1953]. This represents the farthest extension of state power, so far, in pressing out-of-state sellers into service as collectors of state taxes. It's the culmination of a trend in which many states have taken part. Originally a place of business in the state was considered necessary to impose an obligation to collect state sales and use taxes. Then the presence of a regular agent in the state was sufficient. Later almost any sales activity in the state might be enough. Now delivery alone does it. In fact the Maryland court said that even delivery by a common carrier would do it.

The way is now cleared for decision by the United States Supreme Court on the question, how far can a state go along these lines without unduly burdening interstate commerce? In the meantime, sellers across state lines should check the laws of the states in which they're selling, and decide either to comply or to resist. A possible course for resisters is to bill customers for the tax, hold the funds in suspense and make invoices redeemable for the tax when and if the Supreme Court knocks it out.

• Directors' personal liability

Directors who liquidate a corporation by selling its assets at public auction may be personally liable for creditors' losses.

The courts generally feel that a director's job requires broad freedom to act without fear of personal liability for an error of business judgment. Therefore, they are usually reluctant to charge directors with personal liability unless they fraudulently wasted corporate property or made personal gain at the corporation's expense. But that may not always be true. Take this recent case:

A corporation had more assets than liabilities but had insufficient funds to meet its creditors' demands. So the directors (who were the only stockholders) decided to liquidate. They sold the assets at public auction—not always the best way to get a fair price. Result: Assets that cost $60,000 netted little more than $23,000. Debts were $52,000.

The corporation's trustee in bankruptcy sued the directors to compel them personally to pay the difference between $23,000 and the actual value of the assets.

The trial court dismissed the case—it said the directors committed no fraud and made no personal profit from the sale. The most they were guilty of was an error of judgment, and for that they couldn't be held personally liable.

The state's highest court reversed. It held: The absence of fraud or personal profit was no excuse. The corporation was insolvent and therefore the directors were the trustees of the assets for the protection of creditors. As trustees, they were obliged to obtain for the corporation the full value of the assets. On the face of it, they didn't get full value. Thus, they must prove that the price they got was the best obtainable; in other words, that the creditors suffered no loss through the directors' action [*New York Credit Men's Adjustment Bureau* v. *Weiss*, N. Y. Ct. of App., 110 N. E. 2d 397].

The court pointed out one escape hatch for directors in a like spot: It said that if the directors had given the creditors notice of the impending sale, the burden would then have been on the creditors to prove their loss.

• Income tax on sickness benefits

An employee is not taxed on sickness benefits received from workmen's compensation or a health insurance policy [Section 22(b)(5), IRC]. But the Bureau

says he will be taxed on payments received directly from his employer and which are based "in whole or in part" on his regular wage [I.R. News Release, March 26, 1953].

By this ruling it refuses to follow *Epmeier* [199 F. 2d 508]. In that case, the Court held that sick benefit payments under a company plan were not taxable. It said the plan was "health insurance" even though not expressed in a formal insurance policy and the employee paid no premiums. That plan contained many provisions typical of an insurance policy.

What about sick benefits which are *not* geared to salary? The Bureau leaves the question open.

• Timing corporate charitable deduction

If the board of directors of a calendar-year corporation this year authorizes a charitable contribution and actually pays it between January 1 and March 15, 1954, the corporation can deduct the contribution on either its '53 or '54 return [Section 23(q), IRC]. The same rule applies to a fiscal year corporation, substituting comparable dates. The advantage of this choice is that the corporation can choose to take the deduction in the tax year when it will do the most good.

But watch the procedures. To deduct in the year the gift is authorized (but not paid) the corporation must do more than simply report the gift in its return for that year. It must attach to the return a declaration signed by the president or other principal officer that the gift was authorized in that year. And as to any gift authorized after January 1, 1953, it must also attach a copy of the resolution authorizing the gift [Reg. 111, §29.23(q)-1, as amended by T.D. 5979]. This means that the resolution should be in writing.

In *Faucette Co., Inc.* [17 T.C. 187] the Tax Court held that the Regulation, in an earlier form, was invalid, in so far as the Bureau required that the resolution be in writing as a condition to allowing the deduction. The new TD indicates that the Bureau is renewing its earlier position as to gifts after January 1, 1953. To avoid a costly argument, put the resolution in writing. Then it's a simple matter to attach the necessary declaration and a copy of the resolution to the corporation's return, if the deduction is sought in the earlier year.

• Recent items of interest

Kentucky: Testatrix's will disposed of her "bonds" and "money" in bank but made no mention of her Postal Savings certificates. *Held:* The will did not dispose of the certificates; they pass by intestacy [*Pimpel* v. *Pimpel*, 253 S.W. 2d 613].

New Jersey: Decedent's will gave his brother the right to purchase certain stock owned by decedent at his death. Before his death, decedent transferred the stock to a corporation wholly owned by him. *Held:* the brother was still entitled to purchase the stock [*In re Armour*, 94 A. 2d 286].

New York: Deceased husband's will gave his widow a life estate with the right, in her discretion, to invade principal, as necessary for her comfort. The widow's will contained a recital that she had exercised her discretion to take personal ownership of the corpus, and attempted to dispose of the corpus. *Held:* Any part of the corpus that the widow did not actually appropriate during her life passes to the remaindermen named in the husband's will. Her executor must show whether any of this property actually was used and what remains [*Close's Estate*, 118 N. Y. Supp. 2d 284].

Texas: Testator's will provided that his sister was to take certain stock, but that she should not sell it. At her death, her sons were to take the stock, but were also not to sell it. *Held:* The sister had a life estate in the stock, with a fee simple remainder in her sons. The restraint on the sons' alienation is void [*Benson* v. *Greenville National Exchange Bank*, 253 S.W. 2d 464].

The Cost of Justice:

A New Approach

by **Harry D. Nims** • of the New York Bar (New York City)

■ It is no secret that justice can be very dear. Dockets are crowded. It may be many months or even years before a case is brought to trial. And once the trial has been reached, a plaintiff with a strike case or a defendant with a weak defense can delay final judgment for many more months by a series of motions and appeals, all calculated to wear out the opposing side. All this amounts to a substantial denial of justice. Such is the burden of Mr. Nims' article, which raises searching questions—and proposes an answer. This article is a report prepared for the Survey of the Legal Profession.

■ The cost of illness and of justice is unsatisfactory to the public and to the medical and legal professions as well. To some extent, the public has taken the legal situation into its own hands. Many controversies are arbitrated, and only a very small percentage of cases that are begun in the courts ever reach a trial. They are disposed of in other ways. Medical costs are a more difficult problem. You cannot arbitrate the cost of pneumonia or the expense of tuberculosis. In dealing with its problems medicine is constantly searching for more knowledge and better methods while law prides itself on its opposition to new ideas and its immunity to change.

The cost of litigation is important to many people. If we assume two parties to each case, then in one year about 535,000 persons used the California civil courts and about 795,000 persons used corresponding courts in New York—approximately 1,330,000 in these two states alone.

There is a growing awareness that, in the disposition of controversies in court, there are two distinct methods of approach. One is the conference method that seeks to find the points of agreement between the two parties and to eliminate them. The other is the adversary system that accentuates the points of difference and promotes conflict between the parties.

The Adversary System Increases the Cost of Justice

The adversary system is responsible for much of the cost of justice. Under it a litigant feels he has an inherent right to use the court pretty much as he pleases so long as he keeps within the rules. He may bring appeals he knows will not succeed but knows will impose substantial expense and delay on the adversary; he may make unnecessary motions; he may take extended depositions on matters not essential to a decision; he may employ discovery proceedings for the same purpose and there seem to be no means by which his adversary can protect himself from much of the expense and hardship which such tactics impose.

The court's attitude seems to be a form of the "all's fair in love and war" theory; and the case is allowed to run its course, sometimes for years or until one party or the other, worn out and discouraged by the work and expense, quits or settles.

In this connection it is of some interest to note the use which is made of motions.

In the New York State Supreme Court in 1950, 65,585 motions were filed and disposed of, and 16,017 were begun but not decided, a total of 81,602.

In June, 1951, an examination was made of docket entries in civil cases begun in 1942 in the Supreme Court, New York County, New York. The object was to learn something about the use of motions. An attempt was made to locate cases in which apparently more than a normal number of motions had been used. As shown in Table I, the entries in these cases disclose the use of from ten to thirty-eight motions.

Some idea as to the character of these motions will be shown by listing those used in one of these cases, which was a nonjury action brought by a small corporation against former officers and directors for dereliction of duty and for an accounting:

April 7, 1942—Case begun.

June 5, 1942—Motion to dismiss complaint for failure to state cause of action. Motion granted—amend-

ment permitted (written opinion).

July 31, 1942—Motion to dismiss amended complaint on ground it fails to state a cause of action. Motion granted (written opinion).

August 8, 1942—Motion to dismiss amended complaint. Granted; leave to file another complaint granted.

October 7, 1942—Motion to dismiss complaint. Denied.

November 4, 1942—Motion for judgment on pleading and dismissing amended complaint. Denied.

November 4, 1942—Motion to strike answer as insufficient in law. Denied.

November 13, 1942—Motion to strike certain items from notice of examination. Granted. Defendant ordered to appear with records for examination.

November 27, 1942—Prior order resettled and plaintiff permitted to further amend complaint.

January 19, 1943—Motion for examination before trial. Granted, as to certain items, denied as to others.

January 19, 1943—Motion requiring plaintiff to reply to defendant's separate defenses. Granted.

February 25, 1943—Motion to dismiss complaint. Granted with leave to serve amended complaint.

July 4, 1943—Motion to compel acceptance of service of fourth amended complaint. Denied because not in compliance with order.

December 8, 1943—Motion to make complaint more definite and certain. Denied.

January 27, 1944—Motion for examination before trial. Granted as to certain items, denied as to others.

May 31, 1944—Motion to dismiss complaint. Denied.

March 8, 1945—Motion by plantiff to strike out first and second affirmative defenses. Denied.

March 8, 1945—Motion by defendant for judgment on pleadings. Granted.

August 7, 1945—Appeal from two orders to Appellate Division by plaintiff.[1]

December 1, 1947—Ordered off calendar on reserve calendar call. The case was settled shortly after this order was entered.

This case was in the courts five years and eight months. The services of thirty-one judges were used. Sixteen motions were made. Six opinions were written. There were two appeals.

What this case cost the plaintiff no one but the plaintiff knows but it is safe to say that it was a sizable sum.

The problems involved were largely questions of law. It was not a jury case. No backlogs of untried cases or calendar delay prevented this case from being reached for trial promptly because most if not all of the time it was pending the nonjury calendar of the court was not more than six months in arrears.

In this same court at about the same time in an action for money had and received, twenty-seven motions were used and in a contract case twenty-three motions were used.

It can hardly be doubted that if, soon after answer was filed, these cases had been considered by counsel for both parties in one or more conferences with a judge and the questions involved in the motions had been discussed, most of them could have been disposed of then and there. As it was, in one of them, nearly three years elapsed before even the pleadings were settled. The English judges of centuries ago were able to and did define and state the issues to be tried in hearings held soon after the summons was filed, but that seems to be a lost art.[2]

Orders for New Trials Increase the Cost of Justice

Such orders may be based on error in the trial or in prior appeals. They may require a repetition of the whole litigation which may delay recovery for years and add materially to the expense. Involved in this problem are the efforts of counsel to create and promote error in the hope that it will bring a new trial or one or more appeals and so use the court not as an agency to reach the truth but to drag out the litigation, in-

Table I

	Date of Service of Summons	Number of Motions	Date of Judgment	Time Lapse
1	June 23, 1942	14	July 24, 1943	1 yr. 1 mo.
2	December 5, 1942	21	December 14, 1949	7 yrs. 9 days
3	October 28, 1942	14	April 10, 1944	1 yr. 6 mos.
4	October 9, 1942	21	June 22, 1950	7 yrs. 7 mos.
5	December 3, 1942	17	January 12, 1949	6 yrs. 1 mo.
6	December 18, 1942	20	April 11, 1945	2 yrs. 5 mos.
7	December 3, 1942	20	January 2, 1947	4 yrs. 1 mo.
8	December 22, 1942	18	January 2, 1947	4 yrs.
9	December 24, 1942	24	January 26, 1948	5 yrs. 1 mo.
10	April 8, 1942	16	July 15, 1947	5 yrs. 3 mos.
11	April 2, 1942	20	March 31, 1946	4 yrs.
12	April 23, 1942	17	November 20, 1947	5 yrs. 7 mos.
13	April 22, 1942	34	April 17, 1951	9 yrs.
14	May 8, 1942	38	Last order April 17, 1951	
15	December 5, 1942	13	Last order May 10, 1951	
16	September 29, 1942	14	September 19, 1950	8 yrs.
17	May 27, 1942	15	January 2, 1947	4 yrs. 6 mos.
18	May 6, 1942	15	May 17, 1944	2 yrs.
19	May 7, 1942	13	January 27, 1944	1 yr. 7 mos.
20	June 11, 1942	28	July 13, 1943	1 yr. 1 mo.
21	May 25, 1942	21	November 26, 1946	4 yrs. 4 mos.
22	June 17, 1942	22	December 3, 1947	4 yrs. 6 mos.
23	June 18, 1942	13	July 28, 1945	3 yrs. 1 mo.
24	May 19, 1942	13	May 12, 1947	5 yrs.
25	June 20, 1942	24	April 3, 1945	2 yrs. 10 mos.
26	July 3, 1942	14	May 4, 1946	3 yrs. 10 mos.
27	June 26, 1942	13	August 20, 1945	3 yrs. 2 mos.
28	July 6, 1942	10	May 9, 1946	3 yrs. 10 mos.
29	July 15, 1942	31	July 11, 1949	7 yrs.
30	July 31, 1942	26	December 15, 1949	7 yrs. 4½ mos.
31	July 22, 1942	17	February 11, 1944	1 yr. 6 mos.

1. Two orders of March 8, 1945, were again appealed to the Court of Appeals.

2. See Pound's *Readings on the History and System of the Common Law* (1913, Boston Book Co.) and page 370 of Smith's *Elementary View of the Proceedings in an Action at Law.*

crease its cost and so perhaps induce their opponents to compromise.[3]

New trials may be ordered not only because of errors in law but also because of failure to offer evidence essential to a decision, a failure which might have been anticipated in a discussion of the case with a judge before trial. Chief Justice Vanderbilt has emphasized the value of such conferences as a means of informing the court, before a trial, of the problems likely to be involved and so enabling the trial judge to handle the trial with greater skill and expedition than would be possible without it. Such a discussion of a case with a judge may eliminate surprise which often makes it difficult or impossible to present necessary evidence. Frequently, in such discussions judges request counsel to brief questions of law in advance of the trial, and so enable the court to avoid errors that might serve as a basis for a new trial.

Occasionally, we hear of a case which has been in the courts for a very long time. Albert Jay Nock, in his book entitled *A Journey into Rabelais's France* (1934), refers to a real estate case in France which he said lasted 270 years. We have done far better than that, but in some localities, as a matter of routine it takes as long and sometimes more than twice as long to get a case through the courts to a final decision on appeal as it takes a boy or girl to go through college; and if a new trial be granted, the time involved may be still greater.

Actual contact with litigation seems to have a peculiar psychological effect upon some people with respect to delay. Most of us are ready to criticize court delay, but let the critic be sued and often he welcomes and urges his lawyer to use all the devices that will produce delay, and they are many. While the case is pending, his opponent's witnesses may die or move away or their memory of the facts involved may grow dim, all to his advantage. Records may be lost and presently as the months slip by and his opponent is forced to meet the expense of motions, depositions, examinations before trial and other procedural devices, his zest for the conflict may lessen, and favorable compromise becomes easier. Many a defendant therefore welcomes and approves and is willing to pay for the use of all measures that will produce delay that counsel can suggest.

Delay and delay tactics have great attraction for the plaintiff with a sham or strike case and for the defendant with a weak defense or no defense at all. Sham cases and strike cases would be few indeed if litigants knew that shortly after their case is begun they must face a judge and explain their contentions.

In the past courts have made little or no attempt to prevent the use of such tactics, perhaps because no technique had been developed for finding out the real purpose of attempts to delay and prolong litigation.

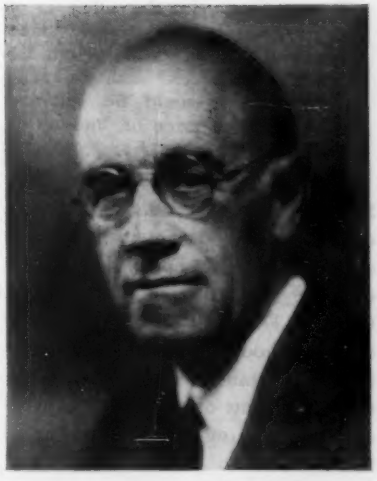
That is no longer true.

Printed Records on Appeal

The cost involved in printing appeal records is another source of unnecessary expense to litigants. It has increased substantially of late, and has become more serious for litigants of small means.

The judges of the United States Court of Appeals for the Fourth Circuit have made an outstanding contribution to the problem.[4] Chief Judge John J. Parker of this court points out that an appeal should not be considered a new proceeding but

> . . . a mere continuation of that begun in the trial court. . . . As every lawyer of experience knows, there is no sense in printing the entire record. Nobody reads it or ought to read it. After a case has been thrashed out in the trial court, the facts are pretty well established; and the matters in which the appellate court is interested are either questions of law or broad questions of fact which have little to do with the weighing of one piece of evidence against another. If the appellant's hope of success depends upon such matters as the credibility of witnesses or what weight is to be accorded conflicting evidence, he had as well not appeal, for it is well settled that as to such matters the judgment of this trial court will not be disturbed. What is needed on appeal is a brief statement by counsel for each side as to what he deems the relevant facts to be, supplemented by the printing in the appendix to his brief of such parts of the testimony or other portions of the record as he deems necessary to elaborate or explain his statement. . . . Our court has been following this method now for about ten years, and we have had no difficulty in getting the facts. . . .
>
> Some lawyers profess to find difficulty in the use of the appendix method where the sufficiency of the evidence is being reviewed or where the court reviews the findings of fact of the judge, but it is here that the method is of the greatest value. On such questions, the Court should not be sent sloshing around at random through the stenographer's notes of the testimony. The one attacking the sufficiency of the evidence should state in his brief the facts which it tends to establish, quoting in his appendix the portions of the testimony which he deems directly pertinent and pointing out in the brief why these facts are not sufficient to make a case.



Harry D. Nims practices in New York City. He is Chairman of the Pretrial Committee of the Section of Judicial Administration and was a member of the Judicial Council of New York from 1934 to 1949. He is the author of various articles and books on legal subjects.

3. An examination of eighty money judgment cases in a recent volume of the Reports of the Appellate Division, of the New York Supreme Court, showed that in twenty-nine of these cases a new trial was granted.

4. Rules of this Court, Nos. 9, 10, 13.

> The one supporting the sufficiency of the testimony should state the facts upon which he relies and quote in his appendix the crucial testimony. The same method should be followed where attack is made on findings of fact by the trial court.[5]

This system is used by the United States Court of Appeals for the Second, Third and Fourth Circuits, and other courts. For a description of it, see "Record on Appeal in Civil Cases in Federal Courts—An Analysis of Methods".[6] Where this method is used substantial saving of expense to the litigants often results, as well as definite saving of labor for Appellate Courts.

Fixing the Amount of Damages Often Increases Cost

A recent equity case was in the court for twelve years and three months. It cost the plaintiff about $71,000 to recover $117,500. Its chronology is given in Table II.

The plaintiff won his case, but it took him nine years to obtain an adjudication as to *how much* the defendant owed him.

It is not at all uncommon for accounting proceedings to last ten years or more. In 1929, Frederick P. Fish, one of the leaders of the Bar at that time, said of accounting proceedings: "There is a complete failure of justice in almost every case in which supposed profits were recovered or recoverable." (Letter to Howson, January 4, 1929.)

Judge Baker, of the Seventh Circuit, pointed out in 1921 that in a case under consideration it took five years after the end of the trial merely to fix the amount which the defendant owed the plaintiff.

In an equity case which was in the courts ten years and eleven months, the plaintiff collected $54,000, but his expenses were $71,000.

Sometimes patent cases last from five to fifteen years and the settlement of estates may drag on for years. Both may involve accountings.

The procedure now commonly used in accounting proceedings is unnecessarily complicated and technical. It involves far too great an expenditure of time and money. It lends itself readily to abuse in that it can be employed to wear down opponents with limited resources. It can be used in such a way as to amount practically to a denial of justice.

Almost never is the compensation sought in an accounting proceeding susceptible of exact computation in terms of money. Too many uncertain elements are usually involved. At best, any determination of profits or damages through an accounting proceeding is usually a more or less hit or miss proposition, but it can be made reasonably practical, effective and accurate without the costly proceedings so often used without interference from the courts. For instance, a defendant can be required to submit a statement of the number of infringing articles he has made or sold. Each side can be directed to offer testimony of a limited number of witnesses experienced in the industry as to the normal profit in the manufacture or sale of the article in question. A court, with these in hand, often can fix an amount of damages or profits to be paid, which, while not exact, is exact enough to be preferable to a more accurate figure, the fixing of which may involve far more expense in time and money than is worthwhile. This method has been used to some extent. "Something closely approaching accuracy is necessary but it is better to be a little out than too finicking; in the attempt to measure to a millimeter and weigh to a grain one is pretty certain to miss the essence of the calculation."[7]

Present Methods of Handling Pending Cases

What is the real purpose of our courts? Should they confine most of their efforts to trial in the courtroom, or should they render all possible assistance to litigants in all cases on their dockets whether they are on trial or may not be tried for months or years to come?

Usually at least one of the parties is seeking the aid of the court, not so much to try his case as to dispose of it as quickly and inexpensively as possible and without a trial if a trial can be avoided.

If this be the fact, can the courts meet their obligations by concentrating their efforts on trials, taking little or no active interest in a case beyond listing it on an occasional calendar call, until it reaches the trial room often months after it is started?

The title of Rule 16 of the Rules of the United States District Courts is "Pre-Trial Procedure; Formulating Issues", and its first provision reads "In any action the Court may in its discretion direct the attorneys for the parties to appear before it

(Continued on page 522)

5. "Improving Appellate Methods", 25 *N.Y. Univ. Law Rev.* 1 (January, 1950).

6. 26 *Jour. Am. Jud. Soc.* 179-83 (April, 1943), by G. F. Longsdorf.

7. Edgar T. Raymond in *A Life of Arthur James Balfour* (Little, Brown & Company, 1920, page 245).

Table II

1931	October	23	Complaint filed.
1932	March	28-9	Trial, which took two days.
	October	28	Opinion of court filed awarding plaintiff injunction and account of profits.
	December	8	Decree entered, which was appealed.
1934	August	15	Decree affirmed by the Appellate Court.
	November	21	Final decree entered and case referred to master to compute profits and damages.
1935	January—December	2	Defendant's account filed.
	January	23	Then followed twenty-seven hearings before the master; forty-one witnesses; 2,984 pages of testimony; 160 exhibits.
1938	December	15	Master filed report awarding plaintiff approximately $200,000. To this both parties objected, and case was remitted to master for reconsideration.
1941	September	19	Further report by master (143 pages) (two years and ten months later), awarding plaintiff approximately $202,000 profits and about $13,000 expenses, to which decree defendant filed exceptions.
1942	December	11	Trial court sustained defendant's objections and awarded plaintiff 6 cents. Plaintiff appealed.
1943	May	19	Appeal argued.
	December	20	Appeal decided; the opinion suggested a method of computing profits by which recovery of $150,000 would be expected; case was then settled for $117,500.

The Law Office Managers Association:

Los Angeles Lawyers Find Way To Solve Problems

by **Wesley L. Nutten, Jr.** • of the California Bar (Los Angeles)

■ This article describes what one group of lawyers has done to obtain ideas for improving the management of their law offices. Meeting informally at dinner, this group discusses the common problems of lawyers everywhere—what criteria should be used for charging clients? What should be done when a client objects that the fee is too high? What should be the relationship of the young law clerk to the firm? What types of insurance should a lawyer carry to protect himself and his clients? By exchanging ideas and experiences, the participating lawyers have received much practical aid from each other. Mr. Nutten offers the reader some of the benefits of the group's discussions.

■ A number of years ago it seemed to me that substantial benefits could be derived from an association of Los Angeles, California, lawyers having common problems. If such an association was to be of the greatest benefit, certain bases were essential. First, the group should be small enough and of such a character as to allow the confidential exchange of information. Second, the members of the group should be partners in firms which have common problems.

To satisfy the first essential, I decided to include approximately twelve men who were personal friends of mine. I had known most of these men for many years and I felt they would appreciate the benefit of an honest exchange of information about the operation of their own offices. It appeared that much of the benefit of such an association would be lost unless the members were of substantially the same class of firm, with clients of similar character, and with approximately the same type of practice. Also, the members of the group should be relatively few in number and have a common basis of friendship, such as college association, the same social contacts or similar interests which would justify an honest and frank exchange of the intimate operations of their offices.

In answer to the second requirement I chose men who were members of firms having approximately eight to fifteen attorneys. I eliminated the larger firms, as well as the firms with two or three members, because of the feeling that too many of the problems of the smaller and the larger firms were of a different character and involved different considerations from the problems of the medium-size firms which were to be the basis of the group.

The group has been meeting periodically for the last four years. The organization is a very loose one without officers or dues. We meet for cocktails and dinner at one of the local clubs and a discussion for about three hours follows. Ordinarily agenda for the discussion are sent out to the members of the group at the time the notice of the meeting is mailed. The agenda for the most part are made up of suggestions received from the members.

At the time of the formation of the group it was felt that law office management problems would be the principal topic of discussion and such has proved to be the case. Also it should be mentioned that in order to avoid giving Mr. McGranery or his successor, Mr. Brownell, overtime work, it was decided that the purpose of the meetings would merely be an exchange of information. No rules, regulations or agreements were made with reference to such exchanged information. No importance is sought to be conveyed by the formal name by which the group came to be known. After many meetings with no thought of applying a name to the group, one of the members was called as an expert in a case involving the proper amount of legal compensation. He gave some of the exchanged information in his testimony. The judge asked him his basis for the conclusion and, without thinking it of any significance, said "The Los Angeles Law Office Managers Association". The judge seemed much impressed and used the testimony in arriving at his decision.

With all the literature, books, pamphlets, magazine articles and other available data on law office management, one might ask what possible benefit other than social

contacts with other lawyers could be received from group meetings of this type. After nearly four years of periodic meetings, I think most of the members would admit that much practical aid has been received from the discussions. As proof of this conclusion, I will outline or summarize some of the more important subjects which were discussed.

These might be divided into five principle headings: (1) Partnership Agreements, (2) Charges for Professional Services, (3) Salaries of Employees, (4) Forms and (5) Details of Office Operation.

Partnership Agreements Found To Be Informal

Like the shoemaker's son who always has holes in his shoes, we found the partnerships were in the main without any formal partnership agreement. True, most of the partnerships did have an oral understanding of how they thought particular situations would be covered and the books indicated the interest of each partner in the profits. Few, if any, of the firms understood fully the advisability of a permanent agreement or the unfortunate tax consequences of failing to provide properly for the demise of a partner or other possible events.

The practice of law is peculiar in that a large amount of time and effort goes into the building up of the firm's practice. This evidences itself, in part, in the form of partially completed work on pending cases and completed work on cases which for some reason cannot be billed to the client until some future date. This means that special consideration must be given to the method of determining the rights of the estate of a deceased partner to such unfinished work as well as when and how such interest is to be paid for by the surviving partners. In order that the partnership shall continue to realize on such partially completed business, the partner's estate generally must receive its payment over a period of years. In doing this, the firm should be certain that such payments are not included in the income of the partnership. Without such careful consideration the surviving partners may find they are recovering a much smaller amount for their efforts, after paying the deceased partner's widow and also paying an income tax on the entire amount received from the clients. (On this subject a fine article appeared in the *Bar Bulletin of the Los Angeles Bar Association* a number of years ago by Harold S. Voegelin, of the Los Angeles Bar; it is to be found in the September, 1949, issue.)

Consideration was also given to the various types of agreements covering the items of drawing accounts, basis of dividing profits, senior and junior partnerships, including arrangements for entering into such relationships. It was amazing to find the varying ways in which the members of the group had worked out what they considered to be the fair way of dividing the results of the rendition of professional service. In the main it was agreed that if the law firm wished to retain its men, it must offer young lawyers an opportunity ultimately to have a real interest in the firm and not merely a so-called junior partnership. Also it was felt that during the formative and development stages in the life of a promising young man, the firm might well have some profit-sharing plan that would make him feel a part of the office. Many felt that this should not involve a percentage of business brought in by the young lawyer because this might lead to a divided interest on his part, but rather that there should be a division of a certain portion of the net profits periodically, at least once a year.

Charges for Professional Services

On this subject the members received a great deal of aid in arriving at what should be considered in a reasonable charge for services rendered. Many interesting subjects were discussed. (a) Regular clients, where no other consideration than time was involved and no monthly retainer was paid, payment being made for work actually done. (b) Hourly basis to be used with such clients where services were rendered by (1) senior partners, (2) junior partners, (3) employee with considerable experience, (4) employee with five years' experience, and (5) the college graduate who has just passed the Bar. (c) Charge, if any, for simple wills, and for wills where involved trusts have to be contended with. It seemed amazing the number of members who seriously considered whether it was appropriate to make a charge for drawing a will which was commensurate with the time involved in preparing it. Too many lawyers, it appeared, gave consideration to the feeling that one should include as a basis for the charge the probability that he would be employed to probate the will and that it was inadvisable to incur the wrath of the testator by making a charge commensurate with the time and importance involved. The majority concluded that the client felt much better in paying something for his will even though the amount was smaller than it should have been if all of the elements in fixing a fee had been considered. (d) Contingent fees in various types of cases. (e) Items involved in charges, such as (1) stenographic time, (2) office conferences of attorneys, (3) telephone conversations, (4) basis of attorneys' time, (5) postage and notary fees, (6) long distance calls, and (7) miscellaneous items and intangibles to be included. (f) Basis of charges for depositions taken for out-of-state correspondents. As might be expected, some time was spent on the question of ethical conduct of lawyers as well as the question of conflicts of interest, when did they occur, and what was an appropriate way of handling various types of conflicts.

On the question of whether a better understanding could be accomplished with the client if a frank discussion of the basis of the fee was had at the commencement of the relationship, it was the consensus that this was not essential if you were doing business with a corporation which was in the habit of regularly employing lawyers. On the other

hand, if it was an individual who was not familiar with lawyer's fees or if the client showed any indication that he did not understand and desired to know the basis of the lawyer's fee, it would avoid ultimate unfortunate consequences if a frank discussion of the subject was had prior to the rendition of the services. It was concluded that it was far better to lose the client before the services were rendered than to render services and not be paid a fair amount upon the completion of the matter. As to what should be said in answer to the question, it was agreed that it was better to explain the elements which went into a reasonable charge than to attempt to give a specific hourly basis or to estimate what the ultimate charge might be.

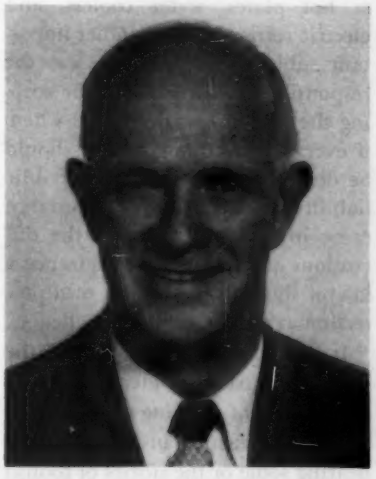
The exchange of information included the monthly wage paid secretaries, stenographers, receptionists, bookkeepers, as well as research men just graduated from law school, and those who had practiced for five years. Also consideration was given to bonuses, Christmas presents, pension or retirement plans, and group and other types of health and life insurance programs. The problems of vacations, illness, as well as overtime, received serious attention.

Again, as in the problem of the relationship of the young lawyer with the office, there was a variety of opinion. Some, and I believe a majority, of offices felt the employees looked at the total earned regardless of how it was paid or what it was termed. There was the feeling among the group, however, that a much more enjoyable and profitable practice would result if some real steps were taken to let the employees have an appreciation of the fact that they too were a part of the professional representation of the client. This could be done in a number of ways, the most important of which is to have a profit-sharing plan in which permanent employees participated on a basis they felt to be definite and certain.

I believe we found the greatest variety of approaches to a particular problem in discussing office forms. First, of course, was the method of keeping a record of the services rendered to the client, as well as the advances of cash made for his benefit. Next was the way to handle properly the record of court transactions, *i.e.*, the maintenance of the docket. Also considered was the handling of telephone conversations and the extent to which a record should be made of the time involved and nature of such discussions.

Finally, of course, came the proper manner of presenting the sad story to the client when the work had been completed. Here, as in the exchange of the ideas on other subjects, there was no consensus as to how the story should be told. Consideration was given to the extent or detail of the services rendered as well as the question of whether a portion of the amount of the charge should be applied to specific items or one sum applied to all of the service rendered. The majority felt the client had a better understanding of the extent of the work done if a somewhat detailed statement was rendered rather than the terse "To Professional Services to December 31, 1950" without any itemization. Also it seemed better to give some detail as to the time involved. This it was agreed should not include the number of hours involved but rather a statement of the specific days on which the services were rendered. In most instances it was the opinion of the majority that lawyers should avoid the use of a round figure, *i.e.*, $5000, in their statements. That in so doing, clients felt the sum was picked out of the air instead of having a relationship to the various elements which make up a reasonable charge.

In dealing with individual clients it was suggested that the statement be itemized in such a way as to automatically give the client a basis for use on his tax return, *i.e.*, to isolate those services which were for the production of income or a deduction for tax purposes. In this way the client would have his attorney's authority for the application of his bill between those items which were and which were not a deduction for tax purposes.



Wesley L. Nutten, Jr., is a member of the California Bar and practices law in Los Angeles. After serving in the Navy in World War I, he attended Dartmouth College and the University of Michigan Law School where he received his LL.B. in 1923.

Also it had to be admitted that on rare occasions clients were not entirely happy with the bill they received and discussion ensued on the subject of how to handle this eventuality. Most of the group admitted that too many lawyers took offense when a client raised the question of a reconsideration of the amount of a bill and by this attitude prevented an amicable settlement of the question. Lawyers should be most willing to have this item discussed openly and without feeling. In the main where a conciliatory and friendly approach is used, the client is generally very fair and the relationship between the lawyer and client is strengthened when the matter is finally adjusted. It was agreed that only in the rarest of instances would a lawyer ultimately gain by resorting to the courts for the settlement of a dispute with his client.

Much useful information was exchanged under the heading, "Details of Office Operations", such as opening and closing hours, holidays to be observed, luncheon periods, coffee time, providing luncheon aids such

as hot plates, water coolers, and electric refrigerators. Another important subject for discussion was the responsibility of the lawyer for keeping the files of his clients and when, if ever, certain files could or should be destroyed. Fire insurance, public liability, and burglary insurance came in for their share in the discussions of what type of insurance a lawyer should carry for his own protection as well as that of his clients.

It was surprising how few of the offices had given consideration to the advisability of carrying public liability or malpractice insurance. After hearing some of the stories of foolish and fancied claims of clients of other offices (of course), I am certain many of the group have revised their approach to these particular problems.

One of the most fertile subjects of aid to the lawyer, strange as it may appear, were the methods by which he could save some of the moneys collected from the client after the man with the gray beard has his say. It was surprising how many of the group failed to take income tax deductions which others had been taking justifiably for years. The Tax Court cases are proof that people can not always agree on what is a proper expense item. On the other hand, through the exchange of information, I think there were many items which were brought to the attention of many in the group on which there could be no question that the item involved was an appropriate expense.

One of our group has for over a year now insisted that a useful purpose could be served by bringing the foregoing to the attention of all lawyers through the kind co-operation of the AMERICAN BAR ASSOCIATION JOURNAL. Because of the feeling of my lack of ability along literary lines and for other reasons, I have refused to comply with his request. Now that I have succumbed to his suggestion, I sincerely hope that there may be other groups in the country who will feel such an exchange of ideas may be helpful and that as a consequence, individual lawyers will get as much good out of such an association as I have.

Shown at the Blue and Gray Regional Meeting at Richmond May 3-6 are (left to right) Charles S. Rhyne, Washington, D. C., General Chairman; President Robert G. Storey; President-Nominee William J. Jameson; and Lewis F. Powell, Jr., Director of the Meeting.

Legal Education:

Postgraduate Internship

by E. Blythe Stason • Dean of the University of Michigan Law School

■ Dean Stason's article was inspired by other articles recently published in the *Journal* which expressed considerable criticism of law schools and present-day legal education. In these pages, he answers some of the criticism directed at the law teaching profession and sets forth a plan of his own for making new lawyers better qualified to serve their clients.

■ Increasingly, members of the Bar in active practice are taking a gratifying interest in legal education. Some of them, including those whose articles are cited in the footnote, are rather severe critics who have in the last two or three years reduced their thoughts to writing for publication in the AMERICAN BAR ASSOCIATION JOURNAL.[1] Critical attacks made by such prominent members of the profession cannot and should not be ignored by those of us who are engaged in legal education. To the extent that the criticisms are sound and can be remedied, we should find a way to do it. To the extent that they are based upon misinformation or lack of information, it is our duty to make the facts known. To the extent that the conclusions are unsound, it is our duty to clear the record by pointing out the fallacies.

In this article I wish to sketch and comment briefly upon the principal points that have been made by some of the authors who have recently voiced criticisms of legal education, then I wish to set forth what I regard as the proper objectives of the law schools, and finally, I wish to offer a suggestion for improving the process of training for active practice of the law, a suggestion which, if followed, would supplement our present very excellent program of legal education and serve to meet in a realistic and practical way at least some of the objections of the critics.

Charges Against Legal Education

First, let us observe the bases of the current crop of attacks on legal education. They may be summarized as follows:

1. *Law graduates lack essential practical skills.* The law schools are charged with turning out graduates who lack the irreducible minimum of essential skills demanded for the business of assuming immediate responsibility for the legal affairs of clients. For example, Mr. Cantrall in his article (previously cited in the footnote) asserts that every graduate should be competent to "examine a title; write a deed and other customary instruments; close a real estate deal; institute and prosecute suits, including the statutory proceedings of his jurisdiction; defend a criminal; prepare individual, partnership and fiduciary tax returns; work out an estate plan; prepare and probate a will; administer an estate, with the federal and state returns; and form, operate and dissolve an individual proprietorship, a partnership and a corporation, including compliance at each of these stages with all the requirements of federal, state and local laws, tax and otherwise, applying to a small business". Also, he says that the graduate should be taught how to deal with clients, how to run an office, how to charge fees. In these matters, it is said, if the current graduate is weighed in the balance, he is found wanting. By way of comment, it is a fact that many schools do give at least some instruction in most of these subjects, but many thoughtful and well-informed persons would probably concede that to make the practicing lawyer really competent in all of these skills would require about ten years of active practice at the Bar—and a goodly number wouldn't get it even then.

2. *Law graduates lack knowledge of local law and practice.* It is charged that the schools fail to impart an adequate knowledge of local statutes, case law, practice rules, customs and other matters which the

1. "Performance Courses in the Study of Law: A Proposal for Reform of Legal Education", by Louis L. Roberts, 36 *A.B.A.J.* 17 (1950); "Legal Education for What? A Lawyer's View of the Law Schools", by James T. Connor, 37 *A.B.A.J.* 119 (1951); "Law Schools and the Layman: Is Legal Education Doing Its Job?" by Arch M. Cantrall, 38 *A.B.A.J.* 907 (1952).

young lawyer must master in order to carry on an independent practice in the jurisdiction, and hence he is not competent to assume responsibility for the affairs of clients. It is true that the schools cannot undertake to teach all the local law, but I know of no school that does not encourage its students, to the extent that they know where they will be practicing, to work on the local law paralleling the subject matter of the several courses; and it is certainly true that the well-trained graduate orients himself in the local law very rapidly.

3. *Law professors are unfamiliar with actual practice.* It is charged that law professors are ivory tower characters, that either they never practiced law, or, if they did, it was long years ago. Therefore they cannot be expected to impart to students the "how-to-do-it" competence required for admission to the Bar, and their competence even for the teaching of theory is sometimes questioned. In my thirty years of law teaching I have known dozens of law teachers who have kept themselves quite as thoroughly abreast of the skills in their respective fields of specialization as they have kept up with current developments in legal theory, but the charge, in any event, reflects substantial lack of confidence in the teaching branch of the legal profession. One author is so sure of our shortcomings that he asserts positively that all full-time law teachers should be liquidated and supplanted by part-timers who spend the rest of their time in active practice. "Learning", says he, "is not quite enough to qualify them [law teachers] completely. Wisdom is needed. And wisdom is learning tempered by experience."

4. *Law courses are outmoded.* It is charged that law courses are ill conceived, the result of an ingrowing system of recruitment of law teachers. The courses are not in tune with the times, sometimes even "more than a quarter of a century" out of date, too often badly integrated. It is even said that they are too often worked out on a casual basis by the individual professors who seek to satisfy their own willful personal desires, to promote their pet hobbies rather than to concentrate on the task of training students to practice law. This, of course, imputes serious incompetence and completely overlooks the fact that law faculties have their curriculum committees conscientiously and constantly at work, improving and keeping the course offerings up to date, integrating required courses with each other, scrutinizing the electives, and in general molding the entire program to make it the best possible under the circumstances. Furthermore, most of the leading classroom books have been thoroughly revised since World War II. In regard to the "pet hobbies", critics may be surprised to learn that law professors are really far more concerned with the needs of their students than with their own desires regarding the subject matter to be covered.

5. *Law class materials are ineptly chosen.* It is charged that law faculties fail to use good judgment in the selection of classroom materials, that they devote almost exclusive attention to appellate cases, that they overlook the importance of the raw facts that make up the evidence in the trial record or the materials used at the consultation table, that they lose contact with the living problems of law practice. One critic even asserts that the case method is psychologically unsound. It is true that a very large portion of law study involves the examination of supreme court opinions and decisions, but it is also true that a large proportion of the materials of the classroom consists of statutes, forms, documents, raw facts, regulations of administrative agencies and text materials. The charge that schools devote almost exclusive attention to appellate cases rests upon misinformation.

6. *Medical schools give better professional training.* It is charged that the law schools do not do their job nearly as effectively as do the schools of medicine. If there is merit in this charge, at least attention should be called to the fact that the medical schools take four years of a student's lifetime instead of three, that to the four years they add a fifth year for internship, plus additional years for specialization. Give the law faculties five years and they could do many things not now possible. It can be further noted that live patients can be brought into a teaching hospital, but no one has yet discovered a way to bring live clients (some minor legal aid cases excluded) into the law schools, or how to take the law schools to the courtrooms and law offices.

Objectives of Legal Education

These are the principal charges currently being leveled against legal education. We are all interested in general in seeing to it that law graduates are just as well trained as possible to engage creditably in professional life, but to do that we must have some well-defined concrete objectives. It is possible that some of the critics, and perhaps others who are not connected with law schools, are under a misapprehension regarding these objectives. It seems abundantly clear that criticism without a knowledge and appraisal of specific objectives is likely to be misconceived. I wish next to state these objectives as briefly as possible. Perhaps I should speak only of the school with which I am best acquainted, namely, the University of Michigan Law School, but, with perhaps a few exceptions, I doubt if the objectives of other approved schools differ markedly.

It goes without saying that the really competent lawyer must be trained to engage in some very intricate processes. He must know a great deal of law—a very large number of legal "rules, principles and standards". But much more is involved than just learning a mass of legal doctrine. The lawyer must be able to analyze his client's problems, identifying the legally operative facts and elements. This is necessary to enable him to apply the legal rules to reach a conclusion. More-

over, since the law is seldom written explicitly for the client's special affairs, the lawyer must be able to derive the applicable rules from a mass of case law, statutes and other legal materials—often a very complex task.

Specifically, we expect the students in the three short years that we have them under our jurisdiction in the law school

1. To acquire a thorough working familiarity with the basic rules of law in the fundamental legal subjects: contracts, torts, property, trusts, wills and estates, constitutional law, crimes, equity, corporations, civil procedure, evidence, etc. These are ordinarily required courses. No good lawyer can do without them.

2. To obtain an understanding of the remainder of the *corpus juris* by making a reasonable selection from the numerous elective courses and seminars, such as admiralty, bills and notes, conflict of laws, creditors' rights, domestic relations, future interests, insurance, restitution and securities—all on the private law side; and administrative law, labor law, legislation, municipal corporations, regulation of business and taxation—all on the public law side. Furthermore, students are expected to get a view of the law as a whole as a means adopted by society for ordering its affairs, a view that can be obtained only from such courses as comparative law, international law, jurisprudence, legal history and certain other related subjects.

3. To master the fundamental processes of the "common law" method, that is the processes of analysis and of inductive, deductive and analogical reasoning so characteristic of the common law and so necessary if the lawyer is to derive the pertinent legal doctrines and apply them intelligently to human situations. It may be added that facility with these fundamental processes is just as "practical" as anything the student can learn in law school. In fact, it is one of the essentials.

4. To make a long start on the mastery of certain other important legal skills, some of them being the "how-to-do-it" skills that are so reverently referred to in the critical articles concerning contemporary legal education. We in the law schools certainly do not overlook the importance of imparting practical work-a-day skills, although we recognize that in the three short years available (medicine as I have said uses four years plus a year of internship) we cannot make finished practitioners. (By the way, are the doctors finished practitioners at the end of their fifth year, the internship year?)

And speaking of skills, those emphasized most importantly in the law school are:

(a) Interpretative skills, that is the process of interpreting and determining the meaning of words, phrases, clauses and provisions in statutes, constitutions, trusts, contracts and other legal documents.

(b) Skill in research, ability to find the law through the use of authoritative legal materials and reference aids available in the law library.

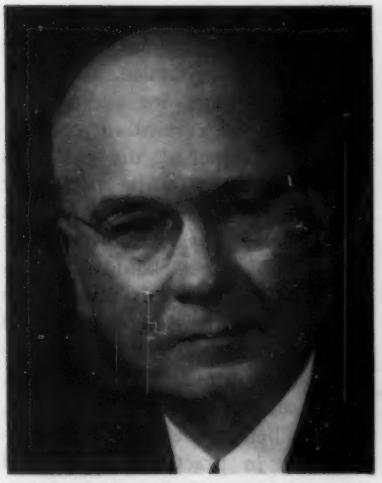
(c) Verbal skill, that is the ability to express legal ideas in concise and accurate English, oral and written, a facility essential to competent advocacy as well as to effective work in the preparation of briefs and the drafting of legal instruments of all kinds.

(d) Skill in draftsmanship, including the preparation in a competent manner of technical legal documents. This includes verbal skill, but it also requires professional craftsmanship. The drafting of pleadings, corporate articles, wills, statutes, and so forth, teaches the student how to express precise legal content in a minimum of words and with great accuracy.

(e) Skill in adjective law, that is in commencing, pleading and trying cases and taking appeals. At Michigan we have devoted special attention to this matter.

Finally, reference is so often made to the lack of "how-to-do-it know-how" in our graduates that it becomes necessary to point out that in a well integrated law program of the year 1953 not only will the foregoing legal skills be very thoroughly emphasized, but, in addition, students will, through courses and problem materials, be introduced to such matters as examination of abstracts, preparation of tax returns, preparation of articles of incorporation, by-laws, and corporate minutes and many other thoroughly "practical" matters. We certainly do not want to make trade schools out of the law schools, but most faculties are fully aware of the fact that their graduates are going to practice law in a very realistic world, and they are a long, long way from short changing the students by depriving them completely of the essential practical skills.

Actually, notwithstanding the views of the critics, legal education's objectives are sound; they are carried out with substantial satisfaction. The students work long hours. The percentage of student failure is high. Good proof of the



E. Blythe Stason has been Dean of the University of Michigan Law School since 1939. Educated at the University of Wisconsin (A.B. 1913) and the Massachusetts Institute of Technology (S.B. 1916), he received his J.D. in 1922 from the University of Michigan Law School. He has been a professor of law at Michigan since 1924. He is the author of many books and articles.

success of the program lies in the fact that the graduates do make good in active practice. Moreover, there is no room for adding new matter to the curriculum without displacing some of the materials now covered, or in the alternative taking more time than the present three academic years. Which of our present objectives should be eliminated? Very definitely one of the most devastating things that could happen would be to dilute the present sound training in theory with its reasonable emphasis on skills, with a heterogeneous mass of instruction in practice details, local law and how-to-do-it techniques.

Some Things the Schools Cannot Do

Concededly, however, there are some things that the law schools cannot and should not do. They cannot bring live clients into the schools and handle their legal problems using students as law clerks. Neither can they within practical limits take the classes to the courtrooms or to the law offices. In that respect they do not have the advantage of the teaching hospitals.

Again, they cannot with wisdom do much with local law. In many schools with clienteles drawn from many states of the Union (at Michigan we usually have students from all forty-eight states) it would be quite impossible, even if it were desirable, to teach such local law or to deal extensively with matters of local practice. Even if it were worthwhile to spend time on these matters to the exclusion of fundamentals, it would be physically impossible to do so. We certainly do not ignore local law. We deal with it in some courses to a limited extent, and we urge the students who have already decided where they will practice to engage in self-education along this line. But we must leave a few things to postgraduate education. Our graduates when they go forth are well trained and intelligent, and the acquisition of the local details that they don't get in the law school has not proved to be a matter of serious difficulty. Indeed, I cannot escape the thought that some of the current critics may not have learned about all these local matters in their law school courses, yet I know they have become excellent lawyers. That we can rely upon our students acquiring the local "know-how" after graduation is best demonstrated by the facility with which our graduates have in years gone by acquired these skills and by the eminence which they have attained at the Bar.

Parenthetically, one of the sins of the modern age is the fantastic belief that it is necessary to teach everybody everything, and to rely not at all upon the ability of students to learn on their own, forgetting that students have a very high degree of competence and self-sufficiency, qualities which we should encourage by expecting them to rely upon themselves, rather than discourage by spoon-feeding everything to them, with the ever present fear that unless we administer a dose of every possible atom of knowledge and skill the graduates will be inadequate to the tasks of life. This is an educational fallacy of serious import.

Again, we cannot expect the law schools to do five years' work in three. We must concede that with only three academic years there is simply insufficient time to teach the students all the law or to make them into finished practitioners. Mr. Cantrall suggests that we could use our time more effectively by following the practices of the United States Army, compelling students to attend six class hours a day instead of two or three. He even allocates the amount of time for study. He suggests forty minutes of preparation for each class hour, thus, he says, making it possible to accelerate the process and making room for the "how-to-do-it" type of training. I am sure that I would not care to teach a class of law students with an inadequate forty minutes of preparation. We expect far more than that and we get it. We actually require from two and one half to three hours of preparation and review for each class hour, a total of fifty to sixty hours per week. To require more would be fruitless; to permit less would be disastrous.

We certainly must be ever vigilant to introduce improvements in legal education, but adopting army methods is certainly not one of them; and, speaking of need of change, it is a fact that we are always introducing improvements in the system. Legal education today is far superior to that of twenty-five years ago. We are making it better every year.

An Internship Year for Law Graduates?

Let us concede, however, that the law graduate needs practical training that he does not and cannot now get in the law schools, that he needs it before he can be really competent to serve clients. If there isn't time in the normal three-year curriculum to give him this how-to-do-it training without seriously impairing other and more important phases of the education process, what can be done to achieve the desired end? I have a suggestion to offer, a suggestion that, if followed, would amount to heroic treatment of the problem, one that would work if real effort is put into it, one that would place burdens on the Bar, not, however, without adequate *quid pro quo*, one that could be adopted in all states of the Union with profit, but which could be adopted in any single state as desired, regardless of other adoptions. I suggest the following:

1. All graduates should be required to take two bar examinations instead of one before they can assume independent responsibility as members of the Bar; first an examination to be taken immediately after graduation covering the materials normally included in the bar examinations of the present day, after which, if they pass, they may practice under supervision with the right of appearance in stated lower courts; and second, another examination to be taken approximately one

(Continued on page 520)

Accounting in a Nutshell:

A Guide for Lawyers

by **Louis S. Goldberg** • of the Iowa Bar (Sioux City)

▪ Mr. Goldberg is both a lawyer and an accountant. He uses a strictly practical approach to his subject with the objective of supplying the lawyer with information on accounting problems with which he is likely to be confronted. What does he really need to know? How can the need be filled?

▪ Appropriate direction to Bench and Bar in the area of accounting may well rank as one of the topmost needs in the law. As I profess perfect innocence in the art of teaching, I may with immunity venture to observe that the law schools, experimenting through trial and error, have fallen far short of reaching the right answer. I shall not attempt to occupy the sacred domain of pedagogy. But a lifetime devoted to the joint practice of the two professions, law and accounting, may in a measure qualify me to address myself to the needs of the lawyer in the use of accounting in the general practice of the law.

That the lawyer needs accounting knowledge has long been recognized. Accounting problems merge with legal problems in many fields. This we find to be true not only in income taxes, but also in other areas of taxation, and in the law of corporations, partnerships, trusts, probate, damages, evidence, trade regulation, public utilities, percentage leases; the list can be enlarged indefinitely.

While the need is well known, the way to fill it has not been made clear, nor has the nature of the need been well explored. Let me first expose the fallacies. One author suggests that emphasis should be shifted from bookkeeping routines and procedures to accounting as a tool in the lawyer's kit; that the lawyer is likely to be concerned principally with narrow but contentious facets of accounting where premium is on suppleness of thought and accuracy of analysis, rather than facility with a work sheet. Another writer tells us that his book of materials is intended to be used as a supplement to any standard textbook on accounting, that he assumes the student has a grasp of the pertinent portions of the textbook. One of these two teachers, incidentally, is highly critical of the method of the other. The error of both is the effort to teach advanced accounting before basic accounting is mastered. Philosophical refinements are debated before the language is learned. It is like putting on the roof of the house while the foundation is still being built. Moreover, as has been aptly said, the inductive case method has very limited utility at this stage; few cases decided by the courts contain good teaching material for a basic course in accounting; for the most part, the cases show a lack of comprehension of accounting, and are perhaps the best evidence that lawyers and judges need some training in the subject. Given the basic schooling, the law-trained mind can do the rest on its own, as I hope to demonstrate.

Allow me to add one more count to my indictment of accounting instruction in the law school. In the search for qualified teachers, it is said that the person teaching accounting to law students should be schooled in both professions. Another writer uses the word "trained" in place of "schooled". The emphasis of both is the same—on the academic. But the true effort should be to find persons *practiced* in both callings. Only so will you achieve practical accounting for the practicing lawyer.

I have thus dwelt on the negatives in order to make the affirmative more clear. The solution is simplicity itself. The imperious need of the practicing lawyer in this field is "bookkeeping, plus". I am aware that the term is one of disparagement, if not of scorn, in the higher circles. But I earnestly urge that more emphasis on "bookkeeping, plus", and less on metaphysical refinements, will soon solve the accounting problems of the

legal profession. Bench and Bar will find fascination and delight in a new sense of understanding.

"Bookkeeping, plus" is bookkeeping pitched to the elevation of the law-trained mind. It is bookkeeping drained of its routine content and infused with an analytical and theoretical content. It is a core of solid theory and techniques which will supply meaning and substance to accounting principles and procedures. Yet more—and I now divulge to you the main secret—it will make it all amazingly simple. If you suspect that I am oversimplifying, let me remind you that bookkeeping is taught to youngsters in high school at ages 14 to 18 and that what I urge to your thinking is bookkeeping analyzed and organized into theory and principles, a method singularly suited to the law-trained mind.

If I am to succeed in my project of instructing you how to think about accounting in the practice of the law, I must next dispel two misconceptions of accounting widely held by Bench and Bar. Oddly, those notions are diametrically opposed, each to the other, and both are equally wrong. Both serve to thwart our interest in accounting and to distort our thinking.

Acounting Is Not Shrouded in Mysticism

The first of those misconceptions is to enshroud accounting in mysticism. Accounting is thought to be some strange calling, some far-off mode of thought, remote from the lawyer's understanding, moving in a sphere beyond his ken. The accountant is some odd creature who wields a pencil like the wand of the magician to produce results baffling to all normal humans. Figures are organized in formations designed to force our retreat in bewilderment. The language of the accountant is a weird tongue from some distant realm. This genial overstatement serves, of course, to reduce the notion to the absurd.

The second misconception is quite unlike the first. Accounting, lawyers say, is just arithmetic—and so unworthy of our time and talent. Bench and Bar can have no patience with so menial a discipline. Ingenuity of thought is our domain, and skill in analysis; we must not allow ourselves to be distracted by the mechanics of a worksheet. Such trivia are for lesser minds. Ours is the dignity of the higher intellect. And so, engulfed in our own absurdity, we miss the beam of learning.

When we free our minds of these fallacies, we shall be ready for the delights of understanding. Simple bookkeeping, applied correctly in principle and in practice, is the first step in accounting, the first step without which no second step may safely be undertaken. If we seek to hurdle that first step, we need not be surprised if we fall irretrievably into the abyss of ignorance. Beyond that first step is the whole superstructure of accounting principles and practices, essentially a body of accepted conventions.

Accounting principles present a parallel to principles of law. The operation of accounting principles is often indistinguishable from the operation of legal principles. Accounting is not an exact science. Its answers cannot be attained with the precision of a mathematical formula. Accountants are not mathematicians; very few of them have superior mathematical skills. The mind of the accountant, if he is a good accountant, works like the mind of the lawyer; and the same can be true in reverse. Indeed, the accountant is required to have a rudimentary training in law. Accounting principles, like legal principles, admit of variations and exceptions; and, again like legal principles, accounting principles compete with each other, calling for a skilled choice between competing, if not conflicting, concepts. To the law-trained mind this is familiar doctrine; and it is because of these parallels between law and accounting that the lawyer, once he has mastered the rudiments of bookkeeping, can quickly and with facility comprehend accounting theory and practice, and find pleasure and profit in the pursuit.

But I repeat that the lawyer cannot hope to do so until he has first planted himself firmly on that first step of plain bookkeeping. So equipped, he can, as I have said, do the rest himself. He can run down accounting questions as he runs down law questions. Research in the one field is not unlike research in the other—by means of accounting texts, legal texts and the reported cases. He does not, and need not, learn all the law answers in the law school; no more does he need to learn all the accounting answers in the first instance. Chiefly he can learn to recognize specific accounting problems when he meets them; and having learned the language and the techniques of the accountant, he can skilfully collaborate with the accountant.

There is a phase of the language of the accountant to which I would invite your special thought. It is not enough to know, or think you know, the meaning of accounting terms. It is not enough to know, or think you know, how to read accounting reports. Something more is needed in the general practice of the law. Much of the language of the accountant is stated in the form of entries in the books of account; we must learn to read the language of the books of account, the language of bookkeeping. Here, again, we perceive the significance of greater emphasis on simple bookkeeping. "How to read a bookkeeper's book" is obviously a question of bookkeeping. To learn so to read is not difficult; again I remind you that the unorganized minds of youngsters pick this up on the run in the commercial course at the high school or in a few weeks at "business college".

I have read the learned tomes of a thousand pages each, written on accounting for lawyers, by lawyers, for law students. I have been amused to find in those ponderous volumes the oft-repeated warning of the awesome

difficulty of the subject. Now I say to you in measured terms that to the disciplined mind, the law-trained mind, all the learning that stands in the way between you and the beginnings of understanding of accounting can be compressed within the limits of fifteen or twenty minutes of concentrated attention. With the framework so formulated and your interest so stimulated, further time devoted to drill, to practice, to experience, will make that learning a subconscious part of yourself and so make of it a useful tool in your working kit in your law practice. Now let us see if this be heresy or truth.

Begin by separating yourself from your business or your profession. The business is the entity that concerns us, distinct from its owner or owners. This is a sort of "in rem" notion, useful and familiar to the lawyer.

The business "owns" (assets) $1,000. The business "owes" (liabilities) $300. The difference is what the business is "worth" (net worth) $700. Net worth may be called the capital account of the individual proprietor or partnership capital for the partnership or capital stock for the corporation. Thus we have the basic accounting equation:

Assets *minus* Liabilities
equal Net Worth

The accountant restates the same equation thus:

Assets *equal* Liabilities
plus Net Worth

In American accounting, as a matter of convention, assets are *debits* and appear on the *left-hand* side, while liabilities and net worth are *credits* and appear on the *right*. The sum of the debits equals the sum of the credits in double-entry bookkeeping, which simply means that for every debit there is of necessity an equivalent credit (singly or in combination).

The equation as I have last stated it is the way the formula appears at the beginning or the end of an accounting period, after the books are "closed". In statement form, at that stage, the formula actually looks this way:

Debits (left side)			Credits (right side)	
Assets	$1,000.	equal	Liabilities	$ 300.
			plus	
			Net Worth	700.
				$1,000.

But in the interim between "closing" times, when the business is in the swing of its operations, two more factors enter: income (credits) and expenses (debits). If the business earns $100 in fees, and spends $30 in expenses (rent, salaries, etc.), a difference of $70, its net worth is larger by $70, and correspondingly it will have $70 more in assets, to state it in the simplest terms. In this view, the operations (income and expenses) are regarded as direct variants of net worth. The formula then appears:

Debits (left side)			Credits (right side)		
Assets	$1,070.	equal	Liabilities		$ 300.
			plus		
			Net Worth		700.
			Expenses (debit)	*Income* (credit)	
			$30.	$100.	70.
					$1,070.

This same formula is more compactly stated thus:

Debits (left side)			Credits (right side)	
Assets	$1,070.	equal	Liabilities	$ 300.
			Income	100.
Expenses	30.		Net Worth	700.
	$1,100.			$1,100.

In practice, the formula is not presented that way. The conventional manner is in "Trial Balance" form, thus:

Trial Balance	*Debits*	*Credits*
Assets (listing them)	$1,070.00	$
Expenses (listing them)	30.00	
Liabilities (listing them)		300.00
Income (listing the items)		100.00
Net Worth		700.00
	$1,100.00	$1,100.00

The "Profit and Loss Statement" or "Income Statement" will, of course, then be:

Income	$100.00
Expenses	30.00
Net Income (forward to Net Worth)	$ 70.00

The "Balance Sheet" or "Statement of Assets and Liabilities" will appear thus:

Assets:	$1,070.00	Liabilities:	$	$ 300.00
		Net Worth:	700.00	
		Net Income:	70.00	770.00
Total Assets:	$1,070.00	Total Liabilities:		$1,070.00

Stripped to the skeleton, this is all there is to the basic accounting formula, technique and financial statements. Add all the flesh you wish, expand the weight ten-thousandfold or more, rearrange the form of presentation, yet always you will find this basic pattern; there is none other. It is quite as simple as that.

We have yet to discuss the books of account. But before doing so, allow me to present two theories or working rules of thumb that will serve to clear away much brush and confusion. You may be surprised to find, listed together as debits, as in the foregoing trial balance, both expenses (costs) and assets, as if they were of like kind. In accounting theory, they are of like kind. Learn to think of assets as "unrecovered costs". So long as the business is in operation, capital is invested in assets which it is expected will be consumed as costs in the earning of revenues, and so recovered with an increment of gain. Thus, in our illustration, we began with $1,000 in cash. We spent $30 for expenses. At that stage, we had $970. in cash and $30 in expenses to be recovered. When our income of $100 came in, we got back our $30 so invested in expenses, with $70 to boot, increasing our cash or other assets to $1,070. Investment in a law library, or in machinery, or in merchandise can be visualized in like manner.

"Debit What You Receive, Credit What You Pay Out"

The second is this simple working-rule, to enable you to know what to debit or what to credit: Debit what the business receives; credit what the business pays out. In a given transaction, one or the other may be obscure, but not both; finding one, you have the other, too. "Receives" and "pays out" are not confined to cash; they refer to anything that is a debit on the one hand, or a credit on the other. The business may receive cash, or an account, or a note, or law books, or merchandise, or any other form of "unrecovered cost"; it may pay out cash or incur a liability of some kind. I know that the philosophers of accounting look askance at this rule of thumb and that they will tell us it does not square with the refinements of theory. But you will praise its simple virtues when you compare it with the nine or the twenty-seven rules they offer in its stead.

With a little practice, you will achieve facility with this simple posting rule. In applying it, we must of course constantly remember the basic formula:

Assets and expenses are *debits* and equal Liabilities and income and capital, which are *credits;* and also the "in rem" concept, separating the "business" from its owners. Thus, as to capital, what the business *receives* is cash or some other asset (debits), while the credit is to capital account, which is a capital liability, owing by the business to its owners. Thus also, as to income, what the business *receives* when it realizes income is usually cash or some other asset (debits), while the credit goes to income account, which, as we have seen, is an increment to capital to augment the capital liability of the business to its owners.

Summarizing: these three features, the posting rule, the in rem concept, and the five-phase formula, give you in a capsule all there is to basic bookkeeping theory and technique.

The Two Books of Account: the Journal and the Ledger

Now for the books of account: There are two basic books, and only two. This, too, is as simple as that; do not believe otherwise. One is the journal, where transactions are recorded as they take place. The other is the ledger, in which the journal entries are analyzed and classified. The ledger will have one account (one page) for each line that appears in the Trial Balance (or vice versa).

In our illustration, the journal may appear thus:

(Supply dates)	*Debit*	*Credit*
Expenses (listing them), Dr.	$ 30.00	$
Cash (or Accounts Payable), Cr.		30.00
Cash (or Accounts Receivable), Dr.	100.00	
Income from Fees, Cr.		100.00

To illustrate just one ledger account, cash:

(Supply dates)	*Debit*	*Credit*	*Balance*
Original Cash invested	$1,000.00	$	$1,000.00
Expenses		30.00	970.00
Income from Fees	100.00		1,070.00

Once you have accepted the truth that there are only two basic books of account and have learned to read the language of accounting in the journal and the ledger, you are ready for elaboration—for the infinite variety of these books in practice, and you need not be bewildered by their varying forms. In the well-organized ledger, you will find five divisions or groups, one for each of the five phases of the formula first presented: income, expenses, assets, liabilities, net worth. Each group or division

may contain any number of accounts or pages, it matters not. For some of these accounts (as, for example, accounts receivable, accounts payable, machinery and equipment), you will find a subsidiary ledger which may contain 100 or 10,000 or more individual accounts, all of them "controlled" by a single account in the ledger (which is then called general ledger). Where you find such "controlling accounts", you will also find separate columns in the journal (or other books of original entry), a debit column and a credit column for each of the controlling accounts, to simplify classification and posting.

When you come to the other book, the journal, you will find it "broken down" in practice into five (or more) separate parts or separate books of original entry, such as: cash received, cash paid out, sales, purchases, and the general journal. Each of these may have analytical columns, both for the controlling accounts mentioned and for other classification; and you may also find the details carried in vouchers or in a voucher system.

Fortified with this fundamental learning, thus viewing the framework as a whole, you may proceed understandingly to fill in the structure. You may explore, one by one, the principles governing prepaid expenses, accruals, reserves, depreciation, bad debts, merchandise problems, manufacturing accounts, inventory systems, value concepts, intangibles, surplus, dividends, funds, consolidated statements, and all the rest of the accounting aspects of legal problems. These phases you will find not unlike the study of other subjects in the law.

What shall guide you in that pursuit? Try the 127-page pamphlet on *Basic Accounting for Lawyers,* published by the American Law Institute. Look at the references on pages 126 and 127 of that booklet, and note especially the accounting texts of Finney, the bulletins of the American Institute of Accountants in accounting and auditing and the Accounting Series Releases of the United States Securities and Exchange Commission.

Understanding in accounting, as in law, springs from humble beginnings. Facility and growth, in accounting as in law, are the rewards of long and diligent study and experience. I hope I may have demonstrated to you the utter simplicity of the basic concepts and techniques of accounting, without creating delusions of quick achievement in practice. Stripped of mysticism and viewed in its true dignity, accounting is a fascinating pursuit for cultured minds.

Louis S. Goldberg has been engaged in general law practice and general accounting practice in Sioux City, Iowa, since 1928. A native of New York City, he received his education at the College of the City of New York and at Fordham University Law School. He became a C.P.A. in 1926 and was admitted to the Iowa Bar in 1925.

Michigan To Present Antitrust Institute

■ The Law School of the University of Michigan will present an Institute on "Federal Antitrust Laws—Current Problems and Policy Questions", June 17, 18 and 19, 1953, at the Law Quadrangle, Ann Arbor, Michigan. The program, featuring nationally known speakers, will furnish lawyers and businessmen with guides to business operations and legal counseling in regard to specific problems under the Sherman Act, the Federal Trade Commission Act, the Robinson-Patman Act, and related antitrust laws. For information regarding the program and reservations, write to Professor S. Chesterfield Oppenheim, Antitrust Institute Chairman, Hutchins Hall, University of Michigan Law School, Ann Arbor, Michigan.

Blue and Gray Regional Meeting Is Memorable Success

■ The many outstanding features of its program and its delightful entertainment events combined to make the Blue and Gray Regional Meeting in Richmond, Virginia, on May 3, 4, 5 and 6 a memorable success. The historical and beloved host city welcomed the more than thousand lawyers attending the meeting with all the hospitality for which the South is so famous. Under the inspired local leadership of General Chairman Charles S. Rhyne, of Washington, D. C., Director Lewis F. Powell, Jr., of Richmond, and a score of other prominent bar officials from the City and region, the cosponsors of the meeting were the bar associations of the City of Richmond, and the States of Delaware, Maryland, Virginia, West Virginia, North Carolina, South Carolina, and the District of Columbia.

It was expected that this would be the largest gathering of lawyers ever held in the South, including those from the area, officers of the American Bar Association, and American Bar Association members from other states. This expectation was fully realized, with nearly 1600 lawyers and their wives in attendance.

The initial event was a reception on Sunday evening at which early arrivals renewed old acquaintances and made new ones. The first assembly session attendance Monday morning was unprecedented in that some 600 lawyers were in their seats when President Storey opened the meeting at 9:30. Addresses of welcome were given by J. Lindsay Almond, Attorney General of Virginia; President Fred B. Greear of the Virginia State Bar Association; President B. Drummond Ayres of the Virginia State Bar; and President Melvin Wallinger of the Richmond Bar Association. David F. Maxwell, Chairman of the House of Delegates, responded to the welcoming remarks in a most gracious and charming manner.

The General Chairman and the Director and the presidents of the bar associations in the area covered by the convention were introduced. E. Smythe Gambrell, Chairman of the Regional Meeting Committee, pointed out that in the whole seventy-five years of its existence, attendance at the annual meetings of the Association has exceeded 2,000 only thirteen times and 2,500 only six times. He outlined the place regional meetings have in the service program of the Association, as follows:

> These Regional Meetings are providing forums where thousands of lawyers heretofore inactive in the American Bar Association conveniently may come together and learn of its great program and objectives—may enlist in its fine civic enterprises and, in turn, may receive the inspiration and the continuing education which mean so much in the life of a lawyer. These Regional Meetings, with their institutes, seminars and inspirational programs, provide ideal places where lawyers may effectively make their civic service contributions to the improvement of law and the administration of justice, and where they may come to get something of practical value in their every day practice. These meetings in the past two years have been making use of hundreds of gifted bar leaders, whose leadership talents heretofore have been wasted after their retirement from office in local and state bar associations. In brief, these Regional Meetings are bringing the American Bar Association to the rank and file of the profession throughout the country—giving them a convenient opportunity to see and understand its program and, more important, to participate in it—to contribute to it and receive from it—to enjoy its educational advantages, its inspirational contacts, and the not-to-be-overlooked fellowship of lawyer with lawyer.

James R. Morford, Chairman of the Membership Committee, gave a brief statement on the need for increasing Association membership. President Robert G. Storey then addressed the assemblage on "The Era of National Service of the Organized Bar". He spoke in inspiring fashion of the history of the organized Bar and its contribution to our nation. He summarized plans for "the American Bar Center" and said "we are upon the threshold of a new era which I propose as the era of national service", with the "Center" as an essential tool for the performance of the great public services of lawyers. He said "Great issues affecting our practice and the nation should inspire us to greater tasks", and declared "One man, however dedicated, seldom can do much to bring about improvement in the general administration of justice. He needs the help of the associations of lawyers—minded with him to work unceasingly for a better legal system. That is the mission of the organized Bar." United States Commissioner of Internal Revenue, T. Coleman Andrews, concluded the morning session with an extremely interesting talk on his new responsibilities in the Bureau of Internal Revenue. His address was on a radio broadcast.

Guests of honor at the luncheon session on Monday were Edward W. Hudgins, Chief Justice of the Supreme Court of Appeals of Virginia and Mr. Andrews. Judge Hudgins and Mr. Andrews were presented by Harold J. Gallagher, former President of the American Bar Asociation, who presided. Dr. Douglas Southall Freeman, renowned historian and author of definitive works on Robert E. Lee and George Washington, gave a fascinating talk on "Washington's Concept of the Constitution".

The "world affairs" program on Tuesday morning, May 5, was pre-

(Continued on page 517)

The History of a Prophecy:

Class War and the Income Tax

by Samuel B. Pettengill • of the Indiana Bar

■ Taking his title from the almost forgotten words of Mr. Justice Field in *Pollock* v. *Farmers Loan and Trust Company*, Mr. Pettengill urges us to to pause and think of what our present income tax rates are doing to the social and economic fabric of our nation. A high income tax was one of the tenets of Karl Marx—a tenet that was proposed by a Democratic Party platform and written into the Constitution during a Republican Administration.

■ Fifty-eight years ago, this prophecy was made: "The present assault upon capital is but the beginning. It will be the stepping stone to others, larger and more sweeping, until our political contests will become a war of the poor against the rich, a war constantly growing in intensity and bitterness."

The prophet is long since dead. He is not associated with the political passions and prejudices of today. What he said, therefore, can now be appraised objectively. The prophet was Justice Stephen J. Field of the United States Supreme Court. He made this forecast in 1895 in the famous case of *Pollock* v. *Farmers Loan and Trust Company*, 157 U.S. 429; rehearing 158 U.S. 601.

In that case, the Supreme Court, by a vote of five to four, held the income tax law of 1894 unconstitutional. Justice Field was one of the majority of five. It was this decision that led to the adoption of the Sixteenth Amendment to the Constitution of the United States granting the power to the Congress (which this case had denied) to tax incomes without the need to apportion the tax among the states according to population.

The Sixteenth Amendment is a political curiosity. A Republican President, William Howard Taft, urged it upon Congress in a special message dated June 16, 1909. The 61st Congress, with both houses Republican, voted to submit it to the states for ratification only forty-five hot summer days later, on July 31, 1909. Has any more fateful measure ever passed Congress with so little debate or understanding?

Ratification then followed by forty-two state legislatures, most of which had Democratic majorities as the result of the off-year election in 1910. Only three small states refused to ratify, Connecticut, Rhode Island and Utah. Three others, Florida, Pennsylvania and Virginia, took no action. The amendment became part of the supreme law of the land on February 25, 1913—one week before Woodrow Wilson became President. It was then implemented by a Democratic Congress by the income tax law of October 3, 1913.

It is curious that a Republican President and Congress submitted the amendment, because in the 1908 political campaign, which the Republicans won, their platform was completely silent on the subject. The Democratic platform of that year, upon which William J. Bryan made his third try for the Presidency, contained this plank:

> We favor an income tax as part of our revenue system, and we urge the submission of a Constitutional amendment specifically authorizing Congress to levy and collect a tax upon individual and corporate incomes, to the end that wealth may bear its *proportionate* share of the burdens of the federal government.

The Republicans therefore carried out a Democratic plank in submitting the Sixteenth Amendment for ratification! The Sixteenth Amendment gave Congress the power asked for but placed *no limits* upon its exercise. Note that the Democratic plank said "proportionate"—not "progressive". In this respect, the Republicans outdid the Democratic platform. The word "proportionate" is a *practical limitation on the power to tax*, for no proposal to tax *all* incomes regardless of their size, at the same rate and as high as 40 or 50 or 80 or 90 per cent could possible become law. A proportionate income tax is one in which all incomes are taxed at the same per cent. The nor-

mal income tax is an example. A progressive income tax is one in which the rate of per cent increases as the amount of income increases. The surtax is an example. The Democratic Party in 1908 did *not* propose a "progressive or graduated" tax as previously demanded by the socialists as far back as the Communist Manifesto of 1848. That came later under both Democratic and Republican administrations. The first tax after the adoption of the Sixteenth Amendment, the law of October 3, 1913, was progressive, although only from 1 to 6 per cent.

The Sixteenth Amendment reads as follows:

> The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

The amendment said nothing about a proportionate income tax. This opened the door to progressive or graduated taxes.

When the case of *Pollock* v. *Farmers Loan and Trust Company* was decided, no one seriously contended that Congress could not tax incomes under the Constitution. That was freely admitted. The crux of this famous case which divided both the court and the country into warring camps, as no case had done since Dred Scott was sent back to slavery, was whether Congress could tax incomes *"without apportionment* among the several states and without regard to any census". The Court said it could not.

The Sixteenth Amendment gave it that power. Why, then, did earnest and farsighted men believe that such an amendment would inevitably lead to "a war of the poor against the rich, a war constantly growing in intensity and bitterness"? In short, what great values did the majority of the Court seek to preserve fifty-eight years ago by holding that if Congress did tax incomes, it must apportion the federal levy among the several states in proportion to their populations?

The issue in the *Pollock* case was whether an income tax on rents, interest, dividends, etc., is a direct or indirect tax within the meaning of the Constitution. The Court held that it was a direct tax. But the Constitution said that "No capitation, [poll] or other direct Tax shall be laid, unless in Proportion to the Census", Article 1, Section 9, Clause 4. As the tax was held to be direct and had not been laid in proportion to population, it was unconstitutional.

But what has this to do with a war of the poor against the rich? The answer is that if an income tax passed by Congress were apportioned among the states according to the census, the natural and inevitable resistance to its collection would (in the Court's opinion) prevent the tax rate from ever becoming excessive. This because a poor state, in proportion to its population, would have to pay as much federal income tax as a rich state with the same number of people. It would not permit the confiscation of the wealth of the few by the votes of the many. In short, the Court's interpretation of the Constitution preserved the *effective power to resist* the imposition of excessive federal income taxes. Incidentally, it would also enforce economy in the Federal Government, and so preserve that "wise and frugal government" which Jefferson in his first inaugural said was essential to liberty.

So intent were our forefathers on preventing the swallowing up of the states, the socialization of the young nation's wealth and a war between classes that in Article V they forbade any amendment to be made with respect to levying a direct tax unless in proportion to the census before the year 1808. No doubt they hoped that during the twenty-one intervening years from 1787 to 1808, the people would grow to recognize the dangers of levying direct federal taxes without this *practical limitation* on the power to tax, and would never amend the Constitution to authorize such a tax. As long as Clause 4 of Section 9, Article I stood, a majority of the poorer voters could not, through their representation in Congress, place a tax on the wealthier voters which the poor would escape.

The law before the Court in the *Pollock* case was considered to be a law of the poor against the rich, not because the tax was graduated upward, but because the tax would fall on only an estimated 85,000 people in a total population, at that time, of some 63,000,000. All the rest would escape the tax.

A speech in Congress made by Bourke Cockran, of New York, illustrates this point. Mr. Cockran was a leader of the Democratic Party in the House of Representatives, and one of the great orators of his generation. Speaking on the bill in Congress on January 30, 1894, Mr. Cockran said:

> The tax is not proposed to raise revenue, but to gratify vengeance. . . . The real distinction which commends it to the Populist, but which awakens the hostility of Democrats, is the distinction which it attempts to make between the citizens of this country. . . . You place the Government in an attitude of hostility to the men by whose industry land is made valuable, by whose intelligence capital is made fruitful. . . . It is a situation pregnant with evil and with ruin when the productive masses, the creators of wealth, the architects of prosperity have reason to fear that the success of of their industry will provoke the hostility of their government. . . . I have always found more demagogy among the politicians than among the people. I have never known any industrious poor man who asked for anything more than *absolute equality before the law*. . . . Democratic institutions must perish from the face of the earth if they can not protect the fruits of human industry wherever they are, or in whatever proportion they may be held by the citizens.
>
> The gentleman from Colorado has offered an amendment providing for a graduated income tax. . . . There are hundreds of able demagogues in his district who will denounce him for the very mildness of his proposal, and make his moderation the ground of impeaching his fidelity to the Populist masses. . . . The hope of wealth which is universal, is a greater force for order than the possession of wealth, which is confined to a few. . . . I oppose this bill because it is a manifestation of hostility to that desire for success which is the mainspring of human activity.

What we have before us is not a

question interesting only to historians and legal antiquarians. In the light of today's events, it ranks in importance in the domestic field almost as does the atom bomb in the field of foreign relations.

This point is highlighted by the view taken by President Truman in his veto of the tax reduction bill on June 16, 1947. He said:

> An adjustment of the tax system should provide fair and *equitable* relief for individuals from the present tax burden but the reductions proposed in H.R. 1 are neither fair nor *equitable*. H.R. 1 reduces taxes in the high income brackets to a grossly disproportionate extent as compared to the reduction in the low income brackets. A *good* tax reduction bill would give a greater proportion of relief to the low income group.

The rationale of this statement can be illustrated by supposing that a previous tax law had raised Peter's income tax by 100 per cent and Paul's by 20 per cent. A new law to relieve these burdens "should" reduce Paul's tax by a higher per cent than Peter's! If it completely wiped out the previous increases for both men, it would be "grossly disproportionate"! In short, income taxes should be graduated upward, but any reduction should be graduated downward!

Income Tax Rates Range from 22.2 Per Cent to 92 Per Cent

Income tax rates on individual incomes in 1953 (normal plus surtax) range from a minimum of 22.2 per cent on net incomes of less than $2,000, to 92 per cent on incomes of $200,000 and over. The difference between 22 and 92 is a measure of that "war of the poor against the rich" which Justice Field and Congressman Cockran foresaw. With the passage of the Sixteenth Amendment, American citizens have no constitutional right to keep a single dollar of their incomes.

One plank of the Communist Manifesto of 1848 has been achieved. It reads: "A heavy progressive or graduated income tax". Another plank in that Manifesto calls for the "application of *all* rents of land for public purposes". That word "all" means a 100 per cent tax on rents, or the outright "abolition of property in land". Another calls for the "abolition of *all* rights of inheritance". We are approaching this with a federal estate tax reaching as high as 77 per cent.

A great and vital question today is whether a political system based on the Rights of Man, as against the Power of the State, can long survive when the *unlimited power to tax is coupled with the unlimited power to vote*—that is, when the majority, through their representatives, can levy taxes on a minority at rates which the majority do not pay.

That the war has "become larger and more sweeping", as Justice Field predicted, is shown by a simple comparison of the first federal graduated income tax of 1913 with the present tax.

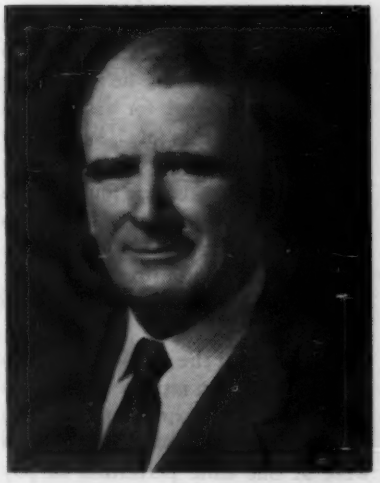
The increase of the "real" burden of income taxes is further shown by comparing the purchasing power of the 1913 dollar—136.6 cents—with that of today's dollar—53.0 cents. Applying this to the exemption then and now, we have the following:

1913, exemption, $3,000 times 136.6 cents = $4,098

1953, exemption, $600 times 53.0 cents = $318

Measured by dollars of the same purchasing power the "real" exemption now is only a little more than 7 per cent of the 1913 exemption. In other words today's exemption of $600 should be $4,098 to be worth as much in cost-of-living goods as the 1913 exemption.

Nor should we overlook the fact that thirty-one state and many city governments are now taxing incomes. In a few places, the citizen pays three income taxes, city, state and federal, the total weight of which is somewhat lifted by allowing city and state income taxes as credits in computing the federal tax.



Samuel B. Pettengill now lives in Evanston, Illinois, after many years of practice of the law in South Bend, Indiana. He served as a representative from Indiana in Congress from 1931 to 1939. He is the author of several books.

Many state and municipal governments have constitutional ceilings on the power to tax and the power to incur debt. The Federal Government has none. The Bill of Rights in the Constitution places limits on the power of the Federal Government over the life, liberty, property, religious freedom, etc., of the people. There is now no limitation on its power to tax either their incomes or estates at death. At this point, a statement by the United States Supreme Court should be recalled: "The theory of our governments, state and national, is opposed to the deposit of *unlimited* power *anywhere.*"

	1913	*1953*
Exemption for single person	$3,000	$600
Lowest individual tax rate	1%	22.2%
Highest individual tax rate	7%	92%
Highest corporate tax rate	7%	82%

Before proceeding further, an item from European history throws a great white light on the course of human events today. In feudal Prussia in 1748—when George Washington was only 16 years old—a decree was issued that henceforward the feudal serf

could be forced to work for his lord only four days a week. The other two days of the work-week he was a free man. He could work for himself and family around his hovel, or garden patch, and with the pigs and chickens, or whatever else the feudal lords of his time permitted him to call his own. This decree was known as a sort of "emancipation proclamation" 115 years before Lincoln freed the slaves.

The labor of the serf was a species of tax not paid in money. It was paid in the forced labor he was required to render his lord. Similarly, Americans were at one time permitted to pay some of their local taxes, not in money, but in labor by "working out the tax" in highway repairs.

But after this "emancipation", the forced labor of four days out of six still amounted to a tax of 66 per cent on the serf's right to live. You will not fail to note that any person or business company today paying a tax of as much as 66 per cent of his total income is, from that standpoint, in exactly the same position as the "emancipated" feudal serf in Prussia 200 years ago! Many of the large business companies, and some individuals are now paying 66 per cent or more. The per cent of earnings, after taxes, which business companies are now permitted to retain to finance expansion and more and better jobs, is the smallest ever known in American history.

This gives point to such phrases as "Taxation Is Slavery" or "The Road to Serfdom".

It is plain that if government taxed incomes 100 per cent, and then kept the people alive with ration cards at state commissaries, as masters once, in effect, maintained their slaves, it would make little difference whether property was completely confiscated and socialized or whether deeds and paper titles to private property continued to be recognized. Everyone would then work for the state as the slave in the Old South worked for his master. The substance of freedom would vanish even if sweet political perfume were still poured over the word itself.

Or, suppose *all* incomes were not taxed 100 per cent. Suppose that the excess of all incomes over $5,000 a year were taxed 100 per cent. The result would be essentially the same. The savings that furnish the capital for new or expanding privately owned business would be almost completely confiscated. This would make it impossible for a free market economy to function. The state would, of necessity, become the sole source of capital, credit and payrolls —and as a consequence the master of the jobs of those in the brackets under $5000 whose incomes *were* exempted from the tax! For as Kipling wrote:

> This is the law and the law shall run
> Till the earth in its course is still,
> And the ages, trickling one by one,
> The cup of time shall fill,
> That he who eateth another's bread
> Shall do that other's will.

Income Tax Can Lead to Slavery

This point is important because millions of Americans have no real fear that their Government would ever by force and violence actually seize and expropriate the legal titles to their farms, homes, places of business and life's sweat—as in Russia—but do not realize that practically the same result can be, and is being, achieved by the more gradual, and subtle, process of taxing away their incomes. As Alexander Hamilton said in the *Federalist,* "A power over a man's subsistence amounts to a power over his will."

The Communist Manifesto of 1848 —now rapidly being adopted by many so-called Democrats and Republicans—not only called for "a heavy progressive or graduated income tax", and the "abolition of all rights of inheritance", but also for the "centralization of credit in the hands of the state by means of a national bank with state capital and an exclusive monopoly". The multitudinous lending agencies of the Federal Government are rapidly centralizing credit.

These principles are advocated in many different ways today—such as a CIO proposal in 1949 that married couples with two children be entirely exempted from federal income taxes unless their income exceeds $4,200 and that the tax on higher incomes be increased still more. Another CIO demand is that income taxes on the lower incomes be included by the Bureau of Labor Statistics in computing the commodity price index. Then, as the cost of living goes up, wages would go up under an escalator clause. This would practically exempt their members from all increase of federal income taxes!

When the Sixteenth Amendment was before Congress in 1909, it was urged that a 10 per cent limitation be placed in it. This was laughed off on the ground that it was absurd to think that incomes would ever be taxed as high as 10 per cent! How naïve can statesmen be? In submitting the 1913 law, the Ways and Means Committee of the House was sure that the new system would lead to "rigid economy in expenditures"!

We return to the prophecy of 1895 foreshadowing the great issue of individualism or collectivism which confronts all mankind today. On the one hand, "Nothing above the State; nothing outside the State; nothing against the State", as Mussolini expressed it, or as stated, believe it or not, by Richard E. Danielson, President of the Atlantic Monthly Company, "In all rights, the individual is nothing, the public everything. . . . As an individual you have no right or claim to anything." (*Atlantic Monthly,* February, 1947.) On the other hand, we have the noble words of the Declaration of Independence, that "All men are created equal" (the citizen and the government official), and "are endowed by their Creator with certain unalienable Rights" to *secure* which "Governments are instituted among Men".

"To Have and To Hold", as expressed in title deeds since Colonial times, has been one of the great driving forces that have built this country. Is the holding of *any part* of what a man makes any longer an "unalienable right"? With tax rates

(Continued on page 521)

Questioned Document Examiners:

A New Profession Has Lawyers as Clients

by George J. Lacy • Secretary of the American Society of Questioned Documents Examiners

■ Deeds, wills, contracts, checks, bonds, election ballots, even letters are often valuable, and there is always a temptation for someone to forge or alter such documents. We live in a scientific world, and when questions of the authenticity of documents arise, lawyers usually turn to scientists. Mr. Lacy is a member of the "New Profession" which deals with such questions. It is interesting to note that, according to Mr. Lacy's figures, 90 per cent of the clients of this new profession are lawyers.

■ Since early in the history of civilization, documents have portrayed the thoughts, the ideals, the history and the business transactions of man. On stone, clay, palm leaves, papyrus and later on parchment and paper, documents have played an increasingly important role until today there is scarcely a business transaction which is not evidenced in some way by a written document, from a luncheon ticket to a will involving millions.

But what is a document? A document may be defined as being an official or authoritative paper which contains proof for information and the establishment of facts. However, we all know that many documents are being prepared and used today which attempt to do just the opposite—they attempt to establish that which is not a fact. These spurious documents may be deeds, contracts, wills, marriage licenses, election ballots, checks, or they may be writings involving a myriad of matters which confront us in our present complex system of living.

Because of the increasing importance of documents, succeeding generations have produced inventive men who have made improvements in the methods of making paper, ink, writing instruments and other elements of documents. Likewise, the number of counterfeiters, or forgers who fabricate or alter documents has seemed to increase with each generation. But the first fifty years of this twentieth century has seen the development of a profession, the chief work of which is the discovery of forgeries and their exposure. The practitioners of this unique profession are called questioned document examiners.

Early in the twentieth century document examiners had worked and studied and demonstrated so well the worth of their knowledge that their services were used more and more, and they became more eminent. Their expert opinions regarding the validity or spuriousness of documents in question were given more and more credence in the courts of law. In an introduction to the first edition (1910) of Albert S. Osborn's book, *Questioned Documents*, Professor John H. Wigmore, Dean of Northwestern University Law School and author of *Wigmore on Evidence*, said:

> . . . If judges and lawyers can thoroughly grasp the author's faith in the value of explicit, rational data for expert opinions, the whole atmosphere of such inquiries will become more healthy. The status of the expert will be properly strengthened, and the processes of a trial will be needfully improved. . . .

Mr. Osborn, who is considered by authorities to have been the international dean of questioned document examiners, spent his lifetime in extensive research and study concerning the problems involved in the examination of documents in question. For many years he studied and delved into the intricacies of handwriting and typewriting identification and the labyrinth of related matters. To a great extent it was through his continued efforts and through his stimulation of the interest and collaboration of others that a scientific approach to this work was developed and to use Mr. Osborn's own words "A New Profession" was born.

For many years a small group of men met informally with Mr. Osborn to discuss ways of improving the discovery and proof of facts in handwriting and typewriting identification and to consider problems involving erasures, alterations, paper,

writing instruments and inks. As an outgrowth of these meetings, the American Society of Questioned Document Examiners was founded under Mr. Osborn's leadership. The preamble to the Constitution of this Society reads:

> Proof of the facts relating to questioned document problems has gradually become very important in the administration of justice. This progress has been due to the application of science to the discovery and proof of facts in handwriting, typewriting, ink, paper and other problems concerning documents and to improved laws and legal procedure. Due to these changes it is now possible to make a disputed document trial a judicially supervised scientific inquiry to determine the facts. In order to continue and increase this progress, a permanent organization of qualified document examiners is desirable and is now constituted, September, 1942.

As further stated in the Society's Constitution, membership is by invitation only and is limited to persons of high and steadfast moral character with a thorough technical training in questioned document work. All prospective members of the Society are invited for a period of two years to be guests at the annual compulsory seminar of the members. Through this procedure the regular members are afforded a chance to observe the work and standards of these guests, and at the end of this two-year proving period the prospective member may be elected to regular membership.

The annual conferences of the American Society of Questioned Document Examiners are usually held in cities in which are located one or more industries which directly or indirectly relate to the profession of questioned document examination. By visiting the plants and observing the details of the manufacture of paper, typewriters, inks, writing instruments, carbon papers and the like, these men become better qualified to scientifically answer questions regarding those things which make a document.

The motto of this Society is "Justice Through Science", and this inscription appears in their official seal. The members pledge themselves to maintain the ethical, educational and technical standards of this profession; to foster scientific research and the development of scientific instruments and processes; to find and assist in training worthy prospective members and to create confidence in this important field of work through exemplary conduct.

Questioned Document Examiners Are More than Handwriting Experts

Although questioned document examiners are commonly known as handwriting experts, actually qualified questioned document examiners are much more than that. In today's practice of their profession, these specialists are required to have knowledge of certain sciences, as well as to be proficient in the use of the many scientific instruments employed in their work. Since the average person is quicker to believe that which he sees rather than merely that which he hears, a thorough knowledge of document photography is extremely important. By the use of enlarged photographic exhibits in conjunction with their testimony, qualified document examiners are able to actually make the document speak for itself. Thereby the judge or jury is able to see and follow the reasons for the opinion of document specialists.[1]

Because of the fact that these specialists are required to give their opinions in the courts of law, they are well versed in the proper presentation of testimony respecting questioned documents and the rules of evidence pertaining thereto. The close collaboration of trial attorneys with these document specialists has resulted in the exposure of various methods of chicanery and has saved individuals and corporations literally millions of dollars.

Some of the many questions submitted to the questioned document examiner and which he is usually able to answer are as follows: Is the signature genuine? Is the handwriting in the body of the document genuine? Was the anonymous letter written by a certain suspected person? Are there any material erasures or alterations? Was a certain writing written before or after the paper was folded? Is there any fraudulent substitution of pages? Was the writing continuously written in the order that it appears? Was more than one kind of ink used in writing the document? Is the paper as old as the date the document bears? What was the original writing obliterated by blotting out? What make of typewriter was used to write the document? Was the typewriting written on a particular typewriter? Is the typewriting consistent with the date of the instrument? Was the page written continuously without being removed from the typewriter? Was the same typewriter ribbon used on all of the pages? Were any sentences, phrases, words, letters or figures added to the original writing?

Furthermore, the qualified document examiner is prepared to give pretrial help to the lawyer who is on the equitable side of a questioned document case. He may assist the attorney in the following matters: (a) selection of fair and suitable standards of comparison; (b) order of questioned document proof; (c) introduction and use of photographic enlargements; (d) suggested direct examination for lay and expert witnesses; (e) cross-examination of opposing lay and expert witnesses whose opinions are incorrect; (f) suggested questioning in depositions or discovery proceedings.

Through scientific procedures these specialists have done much to further the administration of justice in litigations of both large and small import. Probably the best known case in the last fifty years in which questioned document examiners

1. *Boyd v. Gosser*, 78 Fla. 64. 82 So. 758 (1919): ". . . But the error in the conclusion arrived at upon the first hearing consisted in treating the testimony of the . . . expert on handwriting, Wm. J. Kinsley, as merely opinion evidence. It was something more than the mere opinion of the witness. It was a detailed statement of facts . . . which were revealed by the use of mechanical instruments and scientifically established to the degree of demonstration. So the decree is reversed."

have taken an important part is the Lindbergh kidnaping case. During the trial of Bruno Hauptmann, eight of the leading document examiners of the United States[2] testified for the State of New Jersey regarding the handwriting in the ransom notes. Through demonstrative photographic exhibits used in conjunction with their testimony, these specialists were able to show that Bruno Richard Hauptmann wrote the ransom letters.

Probably one of the least known of the services which these qualified document examiners are prepared to render is the deciphering of writing in documents which have been exposed to extreme heat and have become charred to the extent that they can not be read. A few years ago a document examiner was submitted the charred remains of the contents of a bank safe deposit box; he was asked to determine, if possible, the identity of the charred pieces of paper. After the application of various methods and with the exercise of a great deal of care and patience, the specialist was able to decipher and photographically demonstrate that the documents which were then only thin sheets of carbon, had originally been stock certificates. He was able to show the name of the company by whom they were issued, the serial number of the certificates, the number of shares, the par value, the name of the owner and the date of issue of the certificates.

Genuine Signature Does Not Prove That Document Is Genuine

A genuine signature to a document does not necessarily mean that the document is genuine. Recently a typewritten twenty-year promissory note for one hundred thousand dollars was submitted to a corporation for payment. The corporation questioned the validity of the note and it was submitted to an examiner of questioned documents. During the examination of this document in the laboratory of the specialist, he found that the signature to the note was unquestionably genuine. An examination of the typewriting revealed that the type face was of Underwood design but that this particular design was not manufactured until five years subsequent to the date on the note in question. Further examination of the document revealed that it had originally been a genuine document of an entirely different nature. The writing had been cleverly eradicated and the one hundred thousand dollar note typed over the eradication.

When the person who presented the note for payment was advised of these findings, he claimed that the note was found among the old papers of an estate of which he was the administrator. Further investigation by the examiner revealed that the note had been typed on the administrator's personal typewriter, kept at his residence. The claim was emphatically rejected.

Fortunately a document is something tangible. It can be seen. It can be investigated. It can be studied under the revealing microscope. It can be measured by instruments of precision. It can be photographed by the aid of ultraviolet light or by infrared rays. An experienced mind trained to accurately observe and correctly interpret the most minute evidence can be brought to bear on the subject. If genuine, a document in question will survive these tests; if it does not, spuriousness can be exposed.

The American Society of Questioned Document Examiners is furthering the ends of justice by fostering the advancement of the New Profession dedicated to the detection of fraud and proof of genuineness in documents.

George J. Lacy is a native of Texas, who received his education in the Houston public schools and had specialized education at Northwestern University and the University of Houston. He first began studying the science of handwriting identification in 1916 and has maintained an office and laboratory in Houston for the last twenty-five years.

2. Seven of these document examiners became charter members of the American Society of Questioned Document Examiners.

Announcement of 1953 Award of Merit Competition

■ The 1953 Awards of Merit will be made to the state and local bar associations reporting the most outstanding activities, other than administrative or routine, initiated or reaching full development since September 1, 1952.

July 20, 1953, is the *final date* for filing entries. Application forms may be secured at the Headquarters of the American Bar Association, 1140 North Dearborn Street, Chicago 10, Illinois.

The Responsibility of the Lawyer:

Will the Profession Accept It?

by Ben R. Miller • of the Louisiana Bar (Baton Rouge)

■ Mr. Miller points out that the improvement of the legal profession and of the standards of judicial administration must always be the first of the lawyer's responsibilities—and yet, he asks in effect, how many states have adopted the American Bar Association plan for judicial selection? What is being done to stop the practice of appointing federal judges according to political party instead of solely on merit? Mr. Miller sets forth a checklist by which you can determine how well you and your local bar association are meeting the obligations of the lawyer.

■ First let me say that though I believe in the necessity of mighty deeds by those equipped to perform them, I know that it is the unsung continued efforts of men of modest talents, but deep convictions, which slowly but steadily advance and improve our democratic institutions in general and our courts in particular.

There will always be much to be done to perfect our agencies of government because, being manned by humans, they will never be perfect, but lest you look too longingly to the past, permit me to quote from a distinguished American:

> Such a dearth of public spirit and want of virtue, such stock-jobbing and fertility in all the low arts to obtain advantage of one kind or another, I never saw before and pray to God I may never be a witness to again. I tremble at the prospect. Such a dirty, mercenary spirit pervades the whole that I should not be surprised at any disaster that may happen.[1]

That was not a Republican candidate for office in 1952—or even in 1940. That was General George Washington.

Samuel Chase, while a member of the Continental Congress, attempted to corner the supply of flour during the war. Historians are generally agreed that large numbers of the Senators and Congressmen personally profited from their vote in favor of redemption at face value of the defaulted state securities and the nearly worthless Continental currency. Both Daniel Webster and Henry Clay were counsel for the Bank of the United States at the time its charter came up for renewal. Also, while still in Congress, Webster accepted a "memorial" of $37,500 from New England businessmen and represented foreign claimants for damages to American shipping during the War of 1812. It should be stated that apparently no effort was made to conceal these facts.[2]

I firmly believe that there has been a slow, sometimes halting, but overall a steady advance in the standards of government in America. But as long as there are any defects in any of our governmental institutions it is the task of all citizens and particularly those of the legal profession to seek improvement. And we must face the fact that rightly or wrongly, and most often wrongly, the people's faith in the integrity of those in government has been greatly weakened in modern times. Perhaps the greatly increased literacy of the people and the great avenues of modern public information, account for the paradox that the people have become so cynical with so little cause. Take our own profession: Every survey which has been made in recent years shows that the lawyer has lost the high place he once held in the public esteem. But even more disturbing, according to a national poll taken in 1939 by the American Institute of Public Opinion Surveys, 28 per cent of the people did not believe the judges of their municipal or local courts to be honest.

The overwhelming majority of lawyers and of judges are honest men, going about their daily tasks conscientiously and diligently. We know that working through their local and state bar associations, and through the American Bar Association, lawyers of widely divergent ages and localities have steadfastly sought to improve the profession and the judiciary. Men such as Arthur T. Vanderbilt, Chief Justice of New Jersey, John J. Parker, Chief Judge of the Court of Appeals for the Fourth Circuit, Alfred P. Murrah of the Court of Appeals for the Tenth Circuit, and Harold R. Medina, of the Court

1. As quoted in *The Annals of The American Academy of Political and Social Science* (March, 1952) page 3.
2. *Annals, supra,* page 5.

of Appeals for the Second Circuit, are but a few of those who even now are working to improve judicial administration. But men occupying smaller positions—and you will notice I do not say smaller men—are equally active.

What is our responsibility as lawyers and judges in the administration of justice and the protection of our form of government and wherein have our footsteps dragged? Foremost we should realize that we best serve our form of government by improving ourselves and our own integral professional place in our democracy—our profession as lawyers and officers of the court, and the courts themselves. It is a tragic experience to see able men become so concentrated on great movements that they fail as individuals. Distinguished citizens, for example, often will lead youth movements in their community and yet so neglect their own parental duties that they rear a juvenile delinquent in their own home. So first of all, our place as lawyers and judges is to raise our own standards, improve ourselves. Theodore Roosevelt expressed our responsibility in this language: "Every man owes some of his time to the up-building of the profession to which he belongs."

The basic responsibilities of the lawyer and tests to determine if the members of the legal profession of a particular state have met their responsibilities reasonably well, are admirably set out in Chief Justice Vanderbilt's splendid book *Cases and Materials on Modern Procedure and Judicial Administration.* Paraphrasing it, these tests include:

(1) Are the Canons of Ethics observed by the overwhelming majority of the Bar?
(2) Is there speedy and effective procedure for enforcing compliance with the Canons of Ethics, and of discipline for their violation?
(3) Is there really an adequate procedure for the defense of the indigent who are charged with a crime?
(4) Are we meeting our obligation to see that those unable to pay for needed legal services nonetheless obtain them?
(5) Is there continued effort to reduce the cost of litigation, and to eliminate its delays?
(6) Are the state and local bar associations truly representative of the lawyers in the respective areas?
(7) Are your bar associations actively engaged in promoting effective programs for raising the standards of judicial administration in this state?
(8) Do the state and local bar associations present to the public the position of the Bar on important issues of the day, more particularly those relating (a) to judicial appointment or elections, and (b) to government generally?
(9) Finally, are the lawyers the leaders—and for the public good—in public and in civic affairs?

There is generally a lack of understanding among the lawyers and the Bench, as well as honest differences of opinion as to the wisdom, of the American Bar Association's plan for the selection and retention of judges. Among our obligations is the duty to give the public our considered opinion on the professional qualifications of our fellow lawyers who aspire for judicial office or for retention in judicial office. Do we not collectively best know the character, temperament and professional ability of our brother lawyer? Then why should we dodge this responsibility? But this expression must be the considered opinion of the particular Bar. Hence it should be by secret ballot—with the results released to the press without comment. The efficiency of the secret ballot of course depends to an extent on the size of the group.

In Baton Rouge the plan has been utilized in one district court appointment by the Governor, one district court election, one city court election and one district attorney's election. Our "box score" is an extremely respectable one. The plan will serve its greatest public good when an incumbent judge seeks re-election. If he has been a good judge—fair, diligent, courteous—the Bar's endorsement will be overwhelming. Such an incumbent richly deserves this endorsement, and he will be in a better position to maintain the proper dignity of a judicial campaign.

Judges and lawyers should constantly ask themselves these questions—and again I paraphrase Chief Justice Vanderbilt:

(1) Do our judges have the highest possible reputation for integrity?
(2) Do they keep themselves free from the entanglements of state and local politics?
(3) Are they punctual in opening their courts, diligent and prompt in their work?
(4) Is the atmosphere of their courts one of dignity?
(5) Are the Canons of Judicial Ethics overwhelmingly followed?
(6) Are procedural technicalities minimized in our system?
(7) Finally, are the judges collectively aggressively striving to improve the standards of judicial administration in our state?

The confidence of the people in the integrity of our federal courts must be maintained. Appointments purely from the ranks of the party in power of itself will shake the confidence of the public—and especially if those appointments are rewards for party rather than public service.

Do you realize that Franklin D. Roosevelt appointed 106 federal judges of whom 98.1 per cent were Democrats—in fact all but two, who were classified politically as Independents? Truman's record is perhaps only slightly less. But Republicans can't condemn this too loudly for in a speech before the Legal Club of Chicago in 1944, the late Federal Judge Evan A. Evans stated his research showed that of the federal judges appointed by Harrison 87.9 per cent were Republicans, those by McKinley were 95.7 per cent Republicans, by Theodore Roosevelt 95.8 per cent Republicans, by Taft 82.2

per cent Republicans, by Harding 97.7 per cent Republicans and by Coolidge 94.1 per cent Republicans. And if it is remembered that when Franklin Roosevelt took office over 90 per cent of the federal Bench (still according to Judge Evans) were Republicans with most of those in the South then Democrats by necessity—it becomes even clearer that neither party can castigate the other with impunity.

And neither party at its 1952 convention would include in its platform this proposed plank which the 1951 Annual Meeting of the American Bar Association at the instance of John W. Davis urged be adopted by both parties:

> A qualified and independent judiciary is indispensable to the maintenance of a coordinate branch of government under our Constitution and to the protection of the freedoms and the rights of every individual. We commend the policy of the Judiciary Committee of the United States Senate during the past six years, irrespective of party affiliation, of requesting and considering a report and recommendation by the Judiciary Committee of the American Bar Association on nominees submitted by the President for judicial positions. Such policy *shall* be continued. We pledge that only the best qualified persons available shall be selected for appointment to judicial office and recommend that the good offices of the American Bar Association shall be availed of to accomplish that purpose.

That this is not too Utopian an effort on the part of the American Bar Association, is demonstrated by the fact that the bar associations in New York and Brooklyn have had a similar plan accepted by both political parties as to state judicial vacancies in those jurisdictions.

The effort to improve our profession and the standards of judicial administration must always be the first obligation of lawyers. But our duty does not end there. We must give the advance warning of and be in the forefront to fight dangers to our form of government. Our professional training equips us to do this and our duty to do so is clear. Often these will be unpopular and difficult tasks—particularly in times of high emotion. Thirty years ago twelve distinguished lawyers led by Dean Roscoe Pound agreed as a public service to examine the deportation records of Attorney General Palmer, and in these words warned the American people:

> There is no danger of revolution so great as that created by suppression, by ruthlessness, and by deliberate violation of the simple rules of American decency.

But did the voice of the organized Bar raise itself sufficiently and timely when the rights of American citizens in California of Japanese ancestry were trampled upon in the hysteria of World War II? And must we not confess we know the dangers inherent in the reckless assassination of character for political purposes—in the un-American doctrine of guilt by association? Yet in September of 1950, the editor of the *Washington Post* commented that:

> The American Bar has played little or no part in the struggle against the degradation of the investigative process—a degradation that has made it almost the equivalent of the *lettre de cachet* in pre-Revolutionary France.

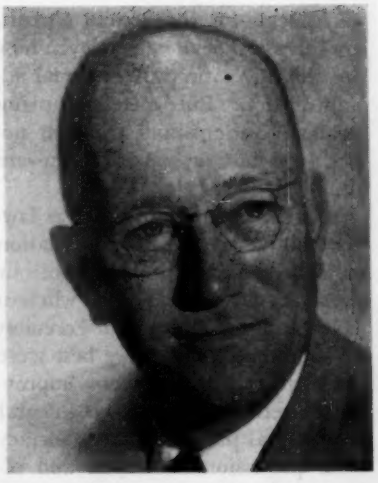
Can we disagree with this statement:

> Times of great internal stress and external danger seem inevitably to produce drastic measures and countermeasures some of which involve the weakening of the foundations of our society. I could cite many examples. Some of the more prominent ones are the Palmer raids during World War I; the refusal to seat 6 duly elected socialist legislators in the State of New York; the erection of current Loyalty Boards; and the tactics and procedures employed by various congressional investigating committees.

That quotation is from no left-wing magazine. It is from an article by William T. Gossett, General Counsel of the Ford Motor Company, appearing in the October, 1952 issue of the AMERICAN BAR ASSOCIATION JOURNAL.

Finally, do we not as lawyers, and regardless of our political affiliation, recognize the basic danger in public officials and particularly members of legislative bodies, accepting gifts—and especially after taking office? Can anyone dispute that since a public official's true allegiance and loyalty should be to the public, that public funds alone should be the source of his compensation and of his expenses as a public official? To a profession which expressly recognizes that one cannot have divided loyalty, this should be obvious. But it becomes crystal clear if we but consider the propriety of a *judge* accepting money gifts from the Association of Casualty and Surety Underwriters, let us say—or from the National Association of Claimant's Attorneys on the other hand.

To sum it up: We all know our responsibility. Our only failure is that often we won't assume it.



Ben R. Miller is a member of the House of Delegates of the American Bar Association and a member of its Committee on the Federal Judiciary. In his own state, he is a member of the Council of the Louisiana Law Institute and has served on the Board of Governors of the Louisiana State Bar and as Chairman of its Committee on Jurisprudence and Law Reform. A former President of the Baton Rouge Bar Association, he is the author of various law review articles.

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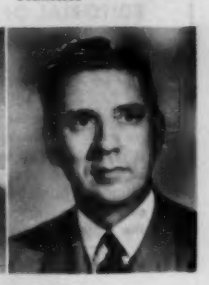

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General Subscription price for nonmembers, $5 a year.
Students in Law Schools, $3 a year.
Price for a single copy, 75 cents; to members, 50 cents.
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1140 North Dearborn Street.....Chicago 10, Ill.

■ *The Cost of Justice*

A by-product of business practices is cost accounting. Cost accounting may show that the costs of operating the business exceed income, and thus warn that danger lies ahead unless economies are effected.

The administration of justice has never given thought to cost accounting. That statement is not intended to imply that courts have never taken stock of what it costs them to operate, but to indicate that no effort has ever been made to ascertain how much it costs to right a wrong or to bring justice to one who seeks it.

In administering justice, there are expenses which the litigants must pay and others which the state absorbs; and there are still others. All of us are familiar with the costly inconveniences to which the witnesses and jurors must submit. The costs so far recounted can be expressed in terms of dollars and cents, but there are many—the hardest to bear—which defy all reckoning in monetary units. They are the anxiety, the mental distress and the feelings of uncertainty and frustration which many who seek justice experience as the weary days drag on and no word comes from the halls of justice.

In this issue of the JOURNAL, Harry D. Nims, whose name is favorably known to all who read legal literature, discusses the cost of justice. His treatise, "The Cost of Justice," is concerned not alone with the out-of-pocket expenditures, but also with the toll taken in the form of mental distress by delay, uncertainty and the vexatious practices to which some resort under the shibboleth "All's fair in love and war." It is high time that our profession take note of the cost of justice. Litigation is on the decline and has been for a quarter of a century. If a business unit, suffering atrophy of like kind, sought a lawyer's advice, it would receive a recommendation for cost accounting. Possibly it may be well for us to heed our own advice.

■ *The Income Tax*

The members of the House of Delegates of the American Bar Association have shown their interest in the subject of income taxes, as well as their concern in the dangers which such power of unlimited taxation can present to our national economy. This was indicated by the approval which the House gave to a proposed constitutional amendment designed to place restrictions on the unlimited power of Congress in the field of income tax legislation. In the absence of such an amendment there is no limitation on the taxing power of Congress in this field, except such limitation as may exist in the discretion of Congress itself. Unfortunately, there have been times when congressional discretion was conspicuous only by its absence.

Elsewhere in this issue of the JOURNAL will be found an article upon this subject written by Samuel B. Pettengill, a former member of Congress and a writer of note. His article, which will challenge the interest of the thoughtful reader, directs attention to the dangers which he shows are inherent in a progressive or graduated fedral income tax, such as is now followed in our present federal tax legislation. Whether you agree in the conclusions reached by the author, your attention will be challenged by the results of Mr. Pettengill's research and study which are produced in support of his premises.

While it may be suggested that the article is one which digresses from the lines normally followed by writers who contribute to the JOURNAL, we publish it with the feeling that it will prove of interest to a substantial number of our readers.

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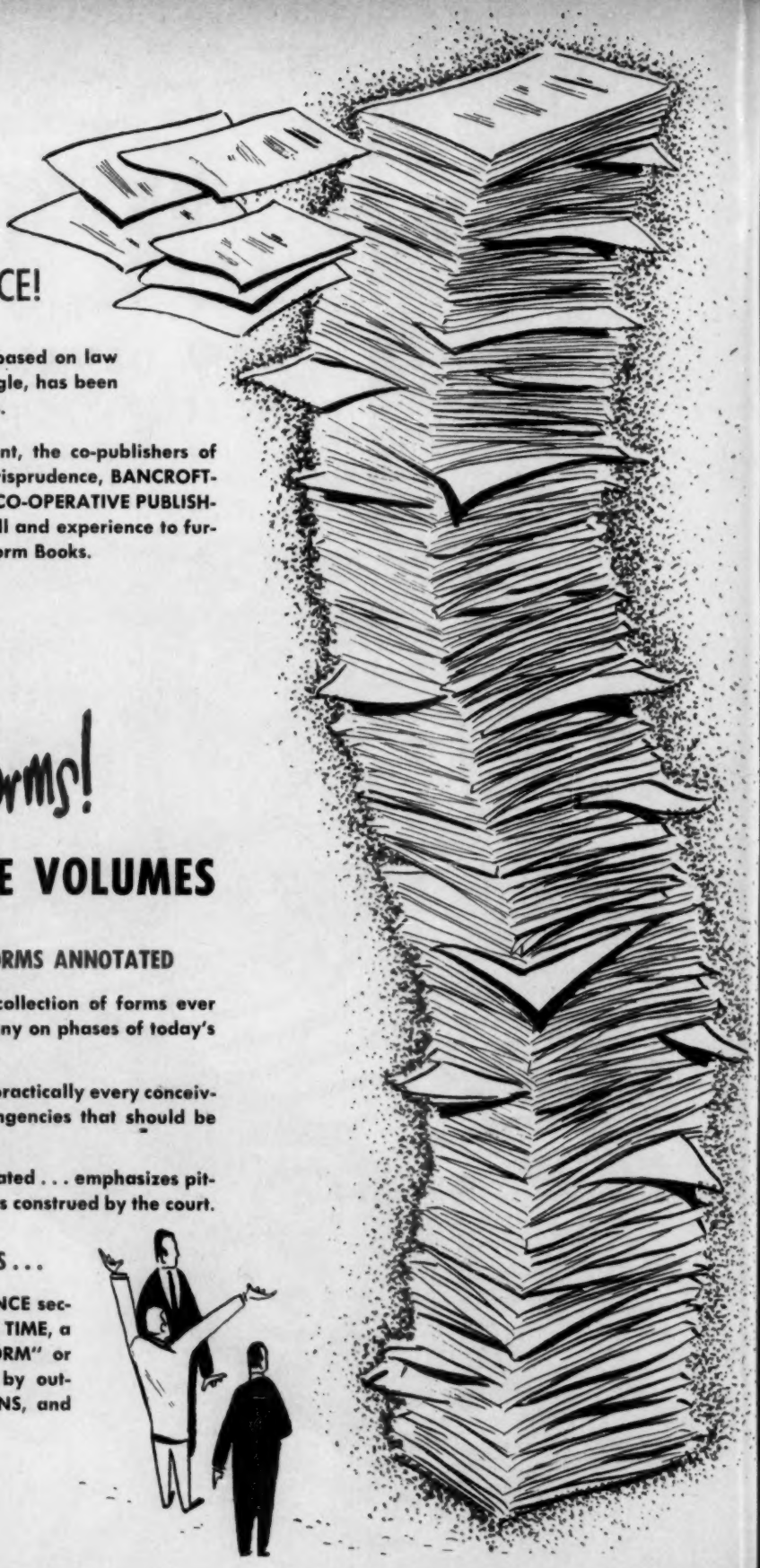

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Books for Lawyers

THE COLLECTED WORKS OF ABRAHAM LINCOLN. *The Abraham Lincoln Association. New Brunswick: Rutgers University Press. 1953. $115. Nine volumes (including Index volume).*

This authentic and invaluable collection of the writings of Lincoln was planned in 1924; at least that was the time when the project was announced by Logan Hay, President of the Abraham Lincoln Association. The task of collecting Lincoln's writings and public utterances was carried on constantly by successive executive secretaries of the Association—Paul Angle, Benjamin Thomas, Harry Pratt and William Baringer. Their successor, Roy P. Basler, is the editor of the monumental work and the assistant editors are Mrs. Marion Dolores Pratt and Lloyd A. Dunlap. The editorial work proper was begun about the time of the opening of the Robert Todd Lincoln Collection in 1947. The editorial advisers were Angle, Thomas and the late J. G. Randall. Dr. Thomas, author of the recent biography of Lincoln, (reviewed in the February issue of the JOURNAL) was not only one of the advisers but also reviewed all the manuscript.

The format and the editing of the volumes is all that could be desired. Explanatory notes follow each item, showing the source and explaining what led up to Lincoln's letter or utterance, with brief but adequate quotation from correspondence when needed for background. This is much less confusing and more desirable than the method, sometimes employed, of strictly chronological reproduction of writings to and from the person whose works are compiled.

The completeness of this collection has added greatly to the stature of a great man. The foreword states that close to twice as many items as have previously been published are contained in this collection. Yet several categories of writings, such as appointments, nominations, pardons, discharge papers, military orders (unless known to have been written by Lincoln himself), routine pardon and clemency endorsements, have been excluded; and utterances which have appeared only in memoirs, diaries and reminiscences have also been omitted, since in such cases proof of authenticity would be lacking. Documents pertaining to his law cases will be published later as a separate work.

Lincoln writings are the most sought for and the most widely scattered of the writings of our national heroes, and private citizens contributed almost as many of his autographed writings as are preserved in public institutions. A chronological list of forged material and other unauthentic items is contained in an appendix.

The first volume extends from 1830, after Lincoln came to Illinois at the age of 21, to August, 1848, when he was a Congressman. Half of Volume IV and all of Volumes V to VIII reproduce his writings and speeches during the Civil War—everything from addresses now considered immortal to brief endorsements and memoranda and even letters which he wrote but never mailed; for example, the letter which he did *not* send to General Meade, expressing his complaint and bitter disappointment that Meade had not crushed Lee after Gettysburg, when Lee was held up by the flooded Potomac, which, together with our victory at Vicksburg, Lincoln said would have ended the war. The letter itself shows his military sense—some would go further and call it genius—while his withholding it shows his sound judgment.

In the latter half of the war desertions became almost epidemic and those apprehended were sentenced to death. That Lincoln intervened and saved many from being executed is, of course, well known, but the extent of his intervention and the time and attention he gave to it are shown by comparing the number of his writings in a given month wherein he suspended the death penalty for military offenses with the total number of his writings in that month. During the period of thirty days commencing with November 20, 1863, for example, of a total of a hundred items there were twenty which ordered suspension of military sentences, practically all of which were sentences of death for desertion. These telegrams and other writings dealing with military punishment reveal the great heart of Lincoln. He realized that military offenders could not go unpunished without impairment of discipline, but he rebelled at the *death* penalty, particularly in the numerous cases of boys in their teens. Their punishment was severe enough, but they were saved from death. In one desertion case, in January, 1864, he wrote an endorsement stating that while the case was "a very bad one" he had commuted the sentence to imprisonment, adding, "I did this, not on any merit in the case, but because I am trying to evade the butchering business lately".

The record made in these Civil War volumes shows Lincoln's humanity and tenderness. It also shows how intently and unceasingly he followed every movement of all the Union armies and intervened when he considered it necessary to do so. It shows the constant pressure on him from all sides and how he met it. It shows an able and determined, yet patient, leader.

The whole record here set forth shows, as stated in the foreword, "the slow and constant development of a great mind and personality". It reveals our greatest President.

BENJAMIN M. PRICE
Chicago, Illinois

STRIKES—A STUDY IN INDUSTRIAL CONFLICT. *By K. G. J. C. Knowles. New York: Philosophical Library. 1952. $8.75. Pages 330.*

STUDIES IN AUSTRALIAN LABOUR LAW AND RELATIONS. *By O. de R. Foenander. Melbourne University Press; New York: Cambridge University Press. 1953. $5.00. Pages xxix, 242.*

For over a quarter of a century Congress has been struggling with the regulation of labor-management relations to the end that the orderly processes of collective bargaining may afford to labor fair wages and decent working conditions, to business a fair margin of profit, and discourage the use of strikes and lockouts while preserving the right to resort to such measures if negotiations break down. In the last national election both presidential candidates pledged themselves to sponsor alterations in the Labor-Management Relations Act of 1947. Legislation on this subject will be among the most important and controversial work of the present Congress.

Mr. K. G. J. C. Knowles' treatise, *Strikes—A Study in Industrial Conflict,* is a book for the specialist in labor relations. The book is an unemotional, objective analysis and evaluation of statistics pertaining to strikes where such statistics exist and of material almost equally impersonal when statistics are not available or pertinent.

Mr. Knowles focuses his attention primarily upon British experience from 1911 to 1947. The period of time selected for study may be regarded as "normal" in the sense that it includes ample doses of what we like to think is abnormal—two periods of feverish war preparation, two world wars, a major depression, two postwar periods of reconstruction and a general strike.

Although it is organized rather than unorganized workers who strike, Mr. Knowles finds that the growth and amalgamation of trade unions, with centralization of control over finances and strike funds, together with the evolution of union officials who tend to be negotiators, so that "both sides now 'speak the same language' and are interested in the first instance in fact-finding rather than in the assertion of rival claims", have tended to restrict the use of the strike weapon and reduce the number and length of officially recognized strikes.

These same forces, on the other hand, create a rift between the trade union officials and the rank and file union membership which causes break-away unionism and unofficial, wildcat, strikes of short duration, which appear to be directed as much or more against the union officials or the government as against particular employers.

While no satisfactory means of curtailing such "unofficial" strikes has been worked out, Mr. Knowles suggests that they may come to be recognized as "an essential safety valve under a system of national collective bargaining".

The author describes with approval the growth of employer organizations which, from an organizational standpoint, he finds to be gaining on the trade unions. The employer groups encourage the growth of trade unions, the unions encourage employer organization and the British government, it seems, encourages both.

In general, strikes have been controlled not by legal prohibitions, but "by the development of a powerful union leadership and the evolution of voluntary and statutory procedures for negotiating wages and working conditions as well as for avoiding disputes". Negotiating machinery is, however, no panacea for curing all industrial ills "for whether the machinery is used or not depends largely on how far rival interests are compatible, as well as on the capacity of both sides to fight".

The well-documented and graphically presented discussion of the differences in number, length and severity of strikes from one region to another and from one industry to another leads naturally into a penetrating analysis of the underlying causes of strike activity. These underlying causes are found to be bad social conditions, fatigue and frustration in industrial work and the inferiority of the worker's position. Of these the most difficult for and challenging to modern industry is the second—fatigue and frustration in industrial work. After reviewing various devices to mitigate these factors—music during work, games and other diversions after work—Mr. Knowles observes that "distraction is a poor substitute for achievement".

The immediate causes for strikes are often trivial, even wage issues merely reflecting underlying causes. Workers seem more willing to strike over monetary than real wages, and high wages are frequently regarded as the only possible compensation for the frustrations of working life.

Mr. Knowles' section on the consequences of strikes is the weakest in the study because of the inconclusive character of the statistics on strike results and the many intangible effects which are not capable of statistical measurement.

Unfortunately Mr. Knowles has purchased objectivity at the expense of "readability". The book is excessively dull in places and does not repay casual perusal. The author inserts quotations from French sources without translating them, a practice vexing to this reviewer, although perhaps not so to the more erudite members of the Bar. The material is appropriately presented topically rather than chronologically, but reference is made to dates of significance in British labor history without bothering to explain the event for the convenience of the reader who is not a specialist in British labor history. Employer and employee organizations are designated by unfamiliar initials, and, occasionally, individuals are mentioned without sufficient introduction.

One infers from Mr. Knowles' references to American facts and figures that he regards American employers as somewhat less sophisticated in their attitude toward labor disputes, American labor as less civilized and

American newspapers more emotional than their British counterparts. He does not say any of these things except the last, but they seem inherent in his choice of references.

No more timely book could be presented to lawyers, economists and legislators than *Studies in Australian Labour Law and Relations* by O. de R. Foenander.

In 1904 Australia adopted the Commonwealth Conciliation and Arbitration Act, outlawing strikes and establishing a system of compulsory arbitration in labor disputes. This system, as amended in 1926 and 1947 is functioning today.

The Commonwealth Parliament, like the Congress of the United States, exercises limited powers delegated to it in a written constitution by several federated states. Legislation by the Commonwealth Parliament beyond these specific powers is *ultra vires* and, therefore, void. Each state regulates its own intrastate commerce, the power of the commonwealth extending only to interstate transactions or "external" affairs.

Regulation of labor disputes by the Commonwealth has not, however, been based on the "commerce power" as in the United States, but on a specific grant of power to "make laws for the peace, order and good government of the Commonwealth with respect to conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one state".

These studies include the historical development of The Commonwealth Court of Conciliation and Arbitration, careful scrutiny of the constitutional problems involved both in connection with limitation of powers and the federal system, the economic impact of the awards of the Court on the nation, the procedure of the Court, the effect of dividing the conciliation and arbitration powers in 1947, minute examination of two recent cases decided by the Court —the Forty Hours Case and the Basic Wage Inquiry Case of 1950—and an interesting final chapter on the right to criticize the Court.

The enormous power entrusted to the Court appears from this statement:

> . . . As the State tribunals, industrial and otherwise, follow very closely—either compulsorily under State law or voluntarily—the orders and awards of the Federal tribunals, and as the State Parliaments in their industrial legislation give close attention to the content and trend of relevant Federal awards, Commonwealth industrial awards, when their cumulative direct and indirect effects are considered, may be regarded as decisive in the fixation of living standards in Australia.

The primary aim of the Australian legislation has been labor peace. This reviewer concluded that too high a price had been paid for an unattainable goal.

Mr. Knowles, in his study, *Strikes*, points out that legal prohibition of strikes has never accomplished its avowed purpose. Mr. Foenander acknowledges that: "The labor situation in Australia, at present, is most unsatisfactory. The workers are discontented, the unions aggressive, employers resentful, awards and orders of conciliation commissioners . . . often defied, while stoppages in the factories and elsewhere are frequent."

Mr. Foenander attributes this condition in part to the 1947 legislation curtailing the powers of the Court and enhancing the powers of the commissioners, thereby introducing a dualism "into the exercise of the Commonwealth general industrial authority". It is an interesting coincidence that in this same year Congress divided the duties imposed by the Labor-Management Relations Act between the National Labor Relations Board and the independent General Counsel, dualism apparently being the vogue in 1947.

The author's analyses of the Forty Hours Case and the Basic Wage Case, with his critical description of the presentations by counsel for all parties should prove instructive and provocative.

This reviewer is of the opinion that maximum hours and minimum wages are subjects best left to legislative debate and determination, and wages and hours in any given industry better fixed by free collective bargaining than submitted to a court for resolution by judicial process.

The compatibility of rival interests and the capacity of both sides to fight are facts of life insufficiently recognized by any system of compulsory arbitration.

As American legislators and lawyers prepare to revise the Labor-Management Relations Act, these two British studies offer a wealth of experience for American consideration.

The Australian study is well written, never dull and makes frequent reference to American decisions of interest to any lawyer. Both books should be required reading for those in the labor field.

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LAWYERS' ACCOUNTING HANDBOOK. *By Christian Oehler. Albany: Matthew Bender & Company, Inc. 1952. $12.00. Pages v, 915.*

This book may be warmly welcomed as another of the many recent efforts in the process of trial and error to satisfy the needs of the lawyer in the realm of accounting. In January, 1953, in 39 A.B.A.J. 40, Mr. Shugerman's book was applauded as meeting the need of the lawyer for a practical understanding of the particular accounts reflected in a balance sheet and a profit and loss statement; Professor Oehler's work is in the same trend. By contrast, the books by Amory, of Harvard, by Katz, of Chicago, and by Wienschienk and Schapiro, of Yale, deal rather with philosophical and legal refinements of accounting theory.

One wonders why so little seems to have been achieved in the search for the apt choice of method. Writing in the *Columbia Law Review*, April, 1932, pages 573-622, and referring to the experiments at Columbia with the subject of accounting as a part of its legal curriculum, Berle and Fisher began with this premise: "Obviously, an attempt merely to teach the details of technical bookkeeping lies outside the law school field. Equal-

ly, however, the well-equipped lawyer is obliged to know underlying accounting principles." The Harvard-Yale-Chicago approach is on the same premise. The soundness of the premise is seriously questioned. Berle and Fisher concluded, in 1932, "that in a very real sense there is a body of law of business accounting"; and since that day the law schools have sought to teach that "body of law" without supplying the lawyer with an adequate foundation in its materials —"business accounting". Unschooled and unpracticed in bookkeeping techniques, the law-trained mind achieves little more than tenuous understanding of that body of law. Mr. Oehler's book avoids that error, but moves far into the other extreme, as will be noted. What the lawyer needs is "bookkeeping, plus"; the present work supplies the bookkeeping, in part, but quite wholly avoids the "plus".

The book is in five parts: accounting, bookkeeping, auditing, preparation of tax returns, and estate accounting. The discussion is centered about specific illustrations, and is presented with the utmost simplicity, replete with repetition. The examples range from the peanut vendor's modest figure problems to a magnificently simplified skeleton of the balance sheet of American Telephone and Telegraph Company: a vivid demonstration of the basic simplicity of accounting. Mystery and awe vanish from the income statement, too, as Mr. Oehler reduces to the simple essentials of a few figures the operating statements of the Bell System and of R. H. Macy & Co., Inc. Much of the accounting section of the book is devoted to ratio analysis, perhaps of more interest to the banker, credit man, or other executive than to the lawyer.

In the preparation of tax returns, five illustrations are given, complete with accounting and other background, including worksheets, and the final, completed tax returns for the sole trader, the retired businessman, the member of a partnership, the partnership return of income and the corporation income tax return. Not many tax returns for "sole traders" could be made in the course of a tax season by the lawyer who performed all the procedures there suggested; obviously, more direct and efficient methods can be achieved. In the case of the corporation income tax return illustrated, on the accrual basis, the accountant will look askance at the absence of a reserve for income taxes of $4,591.38; and both accountant and lawyer may marvel at the reason assigned for omitting discussion of the excess profits tax: the preparation of the Schedule EP is said to be "largely an arithmetical process".

The fifth section of the book is on estate accounting. In large part, this is a labored and repetitious statement of the ordinary legal procedures in the probate of an estate. A filled-in Estate Tax Return Form 706 is presented; in the Real Estate Schedule, the legal description of the property is omitted, contrary to the official instructions; at page 813, "Optional Valuation", neither a "Yes" nor "No" answer is given, though required, and not a word is offered at any point on this theme of optional valuation, on which so many lawyers have serious need for enlightenment.

Significant omissions are observed. In the area of bookkeeping, there is no discussion of control accounts, of analytical journals, of analytical ledgers, of good will and other intangibles, of the doctrine of "assets as unrecovered costs" and the like. Alternative methods of dealing with the merchandise inventory are not given, except for a two-line reference to LIFO. Choice of varying methods of depreciation is not indicated, except for a footnote reference to a decision of Mr. Justice Brandeis, the sole legal citation in the entire volume. It would be helpful to simplify the posting rules, the rules of debit and credit; to present the five-phase bookkeeping formula; and to suggest the "in rem" concept, distinguishing the "business" from its owner.

In the area of accounting, the omissions are substantial. Little is said of the matching of revenues and costs; of contingent liabilities; of the American Institute of Accountants Statements on Auditing Procedure and its Accounting Research Bulletins; of the Accounting Releases of the Securities and Exchange Commission; and of the vital subject of how to read the CPA Certificate and the CPA report, respecting which grave misconceptions are common. The CPA Certificate at page 303, discussed at page 308, may hardly be said to conform to the requirements of Statement No. 12 of the Statements on Auditing Procedure (dealing with inventories), or of Statement No. 23 (having to do with the opinion in the report).

The preface cautions us that "matters of a highly technical nature" are intentionally omitted. But should the lawyer not be given some vision of the great world of accounting beyond the covers of the book, some challenge to go forward, some insight to inspire imagination? The work is pedestrian, presented at the high-school level, not directed to the disciplined, law-trained mind. The emphasis is on mechanics rather than on understanding. Principles are relegated to the background. It is a primer more than a handbook.

The book offers no bibliography. There is some lack of precision: at page 444, "estimated life" is not distinguished from "estimated useful life" or "estimated economic life"; and the concept of residual value is ignored. One of the columns of figures on page 708 is added incorrectly; and the work is marred by other occasional typographical errors and grammatical errors; at times, the style and diction drop to the level of the "language of the street"; examples may be noted at pages 185, 187, 202, 245 and 346.

LOUIS S. GOLDBERG

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USURPATION OF POWER, ARCH ENEMY OF INDIVIDUAL LIBERTY. *By Hamilton A. Long. Philadelphia: American Heritage Education Corporation. 1952. $1.00. (Copies can be purchased from Pur-*

cell Davison Co., 18 Beekman Street, New York, New York.)

This extremely readable booklet is a "refresher course" on the nature of our liberties and the historical background of the political philosophy and experiences of the times which produced an absolutely new concept, viz., a government of limited powers, in which, instead of the sovereign's granting rights to the individual, the people granted limited powers to the government.

The author is Hamilton A. Long and his booklet is published by the American Heritage Education Corporation, "a nonprofit corporation, not connected with any other organization."

In his "Author's Note", he states that in considering individual liberty "attention is focused on its arch enemy, usurpation of power", and quoting from Washington's "Farewell Address", that such usurpation is "the customary weapon by which free governments are destroyed".

The discussion is in two periods: "1787-1936: A Federal Government of Limited Powers"; and "Post 1936: A Federal Government of Unlimited Powers?"

If the people's liberties are doomed, it will be, he says, because of "crumbling from within rather than assault from without". He mentions in particular the universal tendency of officials to regard not the constitutional limits of their power but rather "the *limits of the people's submissiveness*". The thing our forefathers feared most of all in their approach in planning the new government was that all governments tend to become despotic.

Regarding Patrick Henry's statement, "Give me liberty or give me death", Mr. Long says, "Liberty against what"? Such expressions by the statesmen of that period were the result, he says, of bitter experience not only with the tyranny of the English king but also, and more recently, with the tyranny of the majority in their own state legislatures.

In this state of mind the framers of the Constitution felt that only by the device of a limited power government could the people's liberties be reasonably secure.

> In other words, our forefathers believed in setting limits on government's power so that it could never grow into what they feared most—a Liberty-killing Monster of Power: BIG Government. (Emphasis by the author.)

Moreover, as practical men they knew no other type of constitutional government could win the support of the various states. This approach or conception of a limited government was entirely new. Mr. Long says: "*Limited and decentralized for liberty* was the motto of the framers".

> Government is a potential monster, was the guiding truth not only in 1776 but also in 1787 in the framing of the United States Constitution by the Federal Convention in Philadelphia, as well as during the 1787-88 ratification debates throughout America in and out of the State Constitutional Convention, called to consider its ratification.

Even so, many, such as Samuel Adams and Patrick Henry, urged that the limitations prescribed were not adequate. Patrick Henry exclaimed:

> Where are your checks in this government? Your strongholds will be in the hands of your enemies. It is on a supposition that your American governors shall be honest, that all the good qualities of this government are founded. . . .Show me that age and country where the rights and liberties of the people were placed on the sole chance of their rulers being good men, without a consequent loss of liberty!

Accordingly the first ten amendments were promptly adopted. While popularly called the "Bill of Rights", the author points out that they are in reality a "Bill of *Prohibitions*" against the Federal Government and "not a Bill of *Rights* granted to the people", citing *The Federalist* (No. 84).

In their insistence upon these additional safeguards, Patrick Henry and others believed that "it was pure fraud to pretend that Government (the office holder) is worthy of the people's confidence in respect to its being benevolent in the use of power".

Jefferson, as Mr. Long points out, stated in his "Kentucky Resolutions" that "It is jealousy and not confidence which prescribes limited constitutions"; and "In questions of power, then, let no more be heard of confidence in man, but bind him down from mischief by the chains of the Constitution."

Thus Mr. Long states:

> By 1787 Americans in general had become confirmed in their judgment and unshakable in their belief that in time government always creates tyranny, that today's "benevolent" government is sure to be tomorrow's depotism, in the absence of effective limits and checks on its power.

The method of the much feared usurpation of power was prophesied by Jefferson as follows:

> . . . there is no danger I apprehend so much as the consolidation of our government by the noiseless, and therefore unalarming, instrumentality of the supreme court.

Mr. Long concludes this first period as follows:

> From 1787 to 1936, a federal government of limited powers was a key element in the governmental picture in America, as the foregoing brief discussion proves sufficiently for present purposes.

The period, "A Federal Government of Unlimited Powers?", begins with 1936.

To help the reader realize the fierceness of the assault on our constitutional barriers and the quite revolutionary suddenness with which they were broken down, the author prints as an appendix a radio address delivered by Franklin D. Roosevelt in 1930 while governor of New York. The Governor had been requested, he said, "to talk about the respective powers of the national and state governments to rule and regulate, where one begins and the other ends". Mr. Roosevelt said there were a number of vital problems of government,

> *such as the conduct of public utilities, of banks, of insurance, of business, of agriculture, of education, of social welfare and of a dozen other important features. In these, Washington must not be encouraged to interfere.*
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> *Thus, it was clear to the framers of*

> *our Constitution that the greatest possible liberty of self-government must be given to each State, and that any national administration attempting to make all laws for the whole Nation, such as was wholly practical in Great Britain, would inevitably result at some future time in a dissolution of the Union itself.* (Italics by Mr. Long)

Yet Mr. Roosevelt, only a few years later as President, urged members of the Congress to support certain measures which he desired, saying:

> I hope your committee will not permit doubt as to constitutionality, *however reasonable,* to block the suggested legislation. (Italics supplied.)

Whether this reversal of attitude was due to instability or insincerity is here immaterial. In any event, it confirms the accuracy of George Washington's reference to "that love of power and proneness to abuse it which predominates the human heart".

The significance of Mr. Roosevelt's utterances on this subject consists, says Mr. Long, "in the fact that it was a clear and accurate restatement of the long established and well understood American philosophy and system of limited, decentralized government". To which he adds:

> . . . By this time, it should be kept in mind, American civilization had already grown vast, complex and highly industrialized compared to that of early days; so this change of conditions was necessarily taken into consideration in his remarks.

And yet, less than a decade after this "accurate restatement", all these fields of activity supposedly closed to federal power were completely taken over by the Federal Government. The extent of this invasion and the swiftness with which it was brought about are astonishing. They are also alarming for we cannot assume that the tendency toward centralization has run its course.

Even more amazing, in fact almost incredible, is the prescience with which the statesmen of the 1787 period predicted not only such a result but also the very means by which it might be accomplished, namely, the power of the judiciary. Jefferson said:

> It has long, however, been my opinion and I have never shrunk from its expression . . . that the germ of dissolution of our federal government is in the constitution of the federal judiciary; an irresponsible body, (for impeachment is scarcely a scarecrow) working like gravity by night and by day, gaining a little today and a little tomorrow, and advancing its noiseless step like a thief, over the field of jurisdiction, until all shall be usurped from the States, and the government of all be consolidated into one.

Jefferson feared that the general welfare clause might be misinterpreted as giving Congress "a power to do whatever *they* may think, or pretend, would promote, the general welfare, which construction would make that, of itself, a complete government, without limitation of powers". This exact event did occur when in 1937 the Court did confirm Jefferson's fears by interpreting the welfare clause so that the Federal Government now occupies each of these formerly prohibited fields of activity.

Mr. Long discusses at length the *method* by which the Court has aided this usurpation of power—a method which he says permits unlimited usurpation. This method was the Court's abandonment in 1937 of respect for Court precedent in defining the intent of the Constitution's authors regarding federal power limits; in other words, the Court's adoption of the rule that it has the power to change and change endlessly prior Court definitions of this intent. Mr. Long says this amounts to the Court's changing the Constitution, which can, of course, properly be done only by amendment, and constitutes usurpation of power by the Court itself.

Some writers have expressed the belief that the possibilities for further expansion of centralized government by the use of the interstate commerce and general welfare clauses are apparently exhausted and that the "usurpers" are now turning hopefully toward the attractive possibilities of the treaty clause through which to make still further expansion.

Mr. Long does not discuss this very interesting and recent phase of the subject, but the possibilities of further danger have been made very obvious recently by the decision of the Supreme Court in the steel seizure case in which one third of the members of the Supreme Court sought to sustain the President's actions because of the treaty known as the United Nations Charter. The present tendency to abuse the treaty-making power would seem to be one more manifestation of "proneness to abuse (power) which predominates the human heart". It is indeed astonishing how clearly the early statesmen foresaw and how accurately they predicted the danger to the limited-power, decentralized type of government they sought to establish. Benjamin Franklin, after the adjournment of the Convention, was asked, "What kind of government have you provided?" To which he answered, "A Republic if you can keep it".

Mr. Long indeed is to be congratulated and also commended for his portrayal of the determined purpose of the makers of our Constitution to establish a government of limited powers, as well as for having portrayed a disturbingly vivid picture of the extent to which this purpose has been defeated.

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Cost of Postgraduate Courses Held Deductible by Court of Appeals for the Second Circuit

■In a decision having far-reaching implications for lawyers, the United States Court of Appeals for the Second Circuit has held that a lawyer may deduct the expenses of a postgraduate course of legal education for federal income tax purposes.

For more than twenty-five years the Bureau of Internal Revenue has held such expenses to be personal and nondeductible. The Court of Appeals' decision reversed that ruling, holding that in the case at issue the attorney fulfilled a "professional duty" in furthering his postgraduate education.

The test case was taken to the Court of Appeals by George G. Coughlin, a Binghamton, New York, attorney. The New York State Bar Association's Section on Taxation and the American Medical Association intervened in the case as *amici curiae* because the issue involved applied alike to lawyers and physicians.

Coughlin recited in his petition that he incurred expenses of $305 in attending, in 1946, a series of lectures on federal taxation at New York University. He claimed that this amount was deductible as an ordinary and necessary expense of carrying on his professional practice. He declared that he was a member of a law firm that looked to him to keep abreast of developments in federal tax matters.

The Commissioner of Internal Revenue disallowed the deduction and the Commissioner's finding was upheld by the Tax Court, four judges dissenting. Coughlin then appealed to the Court of Appeals, whose decision was handed down April 14 in New York.

The appellate court said the question of deductibility rested on whether the postgraduate training course "was needed for use in a lawyer's established practice".

"In *Welch* vs. *Helvering, supra* at 115, there is a dictum that the cost of acquiring learning is a personal expense", the decision said in part. "But the issue decided in that case was far moved from the one involved here.

"There the taxpayer paid debts for which he was not legally liable whose payment enhanced his reputation for personal integrity and consequently the value of the good will of his business, and it was held these payments were personal expenses. The general reference to the cost of education as a personal expense was made by way of illustrating the point then under decision, and it related to the knowledge which is obtained for its own sake as an addition to one's cultural background or for possible use in some work which might be started in the future. There was no indication that an exception is not to be made where the information was needed for use in a lawyer's established practice."

Even though Coughlin did not claim he was required to take the course to retain his professional license, or his membership in his firm, the court said "he was morally bound to keep informed and did so in part by means of his attendance at this session of the Institute".

"It was a way well adapted to fulfill his professional duty to keep sharp the tools he actually uses in his going trade or business", the court concluded. "It may be that the knowledge he thus gained incidentally increases his fund of learning in general and, in that sense, the cost of acquiring it may have been a personal expense; but we think that the immediate, over-all professional need to incur the expenses in order to perform his work with due regard to the current status of the law so overshadows the personal aspect that it is the decisive feature."

There was no immediate official indication on the part of the Commissioner of Internal Revenue or representatives of the Attorney General whether the case would be carried to the Supreme Court or whether the Bureau would acquiesce.

Approximately eighty law schools in the United States offer postgraduate courses, many of a character similar to that involved in the Coughlin case. American Bar Association affiliates, nearly every state Bar, and many local bar associations hold short postgraduate courses which are widely attended. The American Medical Association estimated in its brief that at least 30,000 doctors every year attend postgraduate courses offered to acquaint them with advances in medical science.

[A review of this decision appears on page 505.]

Review of Recent Supreme Court Decisions

George Rossman
Editor-in-Charge

ALIENS

Resident Alien Is Entitled at Least to Procedural Due Process in Deportation Attempt by Attorney General

■ *Kwong Hai Chew* v. *Colding,* 344 U. S. 590, 97 L. ed. (Advance p. 348), 73 S. Ct. 472, 21 U. S. Law Week 4147. (No. 17, decided February 9, 1953.)

Petitioner is a Chinese seaman admitted to the United States as a permanent resident alien as of 1945. He married an American citizen and his application for naturalization papers is pending. In November of 1950, he passed a screening by the Coast Guard for employment as a merchant seaman and signed as chief steward on a vessel of American registry with its home port in New York City, sailing with it to the Far East. He remained aboard the vessel during this voyage. Upon his return, the immigration inspector at San Francisco ordered him "temporarily excluded" under 8 CFR § 175.57 as an alien whose entry was deemed prejudicial to the public interest. When his ship arrived at New York, he sought a writ of habeas corpus, charging that his detention was arbitrary and capricious and a denial of due process. The Attorney General directed that he be denied a hearing and that the temporary exclusion be made permanent. No reason was given.

The district court dismissed the writ of habeas corpus after a hearing; the Court of Appeals affirmed. Both courts relied upon *United States ex rel. Knauff* v. *Shaughnessy,* 338 U. S. 537, 94 L. ed. 317, 70 S. Ct. 309.

The opinion of the Supreme Court, written by Mr. Justice BURTON, reversed on a holding that petitioner's detention was not authorized by 8 CFR § 175.57. The opinion distinguished this case from *Knauff* v. *Shaughnessy,* which dealt with the rights of an entrant alien rather than the rights of a resident alien. Assimilating the petitioner's status to that of an alien continuously residing and physically present in the United States for the purpose of its discussion, the Court declared that the protection of the Fifth Amendment applies to aliens who are lawful permanent residents of the United States, and that, regardless of whether they may be expelled and deported, such aliens are entitled to notice of the nature of the charge and to a hearing, at least before an executive or administrative tribunal. The Court pointed out that Section 175.57 uses the term "excludable" in designating the aliens to whom it applies; it read this as meaning entrant aliens and not aliens lawfully in permanent residence.

The Court then held that petitioner's constitutional status had not been altered by his voyage, at least in so far as his right to procedural due process was concerned. Section 307 (d) (2) of the Nationality Act of 1940 was cited as authority for the treatment of the petitioner as a continuous resident physically present in the United States. In view of these holdings, the Court found it unnecessary to consider the constitutional status of Section 175.57 if it were interpreted as denying all opportunity for a hearing, or the further issue as to the authority of the Attorney General to deport the petitioner after reasonable notice and a hearing sufficient to meet the requirements of procedural due process.

Mr. Justice MINTON dissented without opinion.

The case was argued by Carl S. Stern for petitioner, and by John F. Davis for respondent.

ALIENS

Conspiracy Conviction Upheld Where Citizens Married Aliens for Sole Purpose of Procuring Admission of the Aliens to the United States

■ *Lutwak* v. *United States,* 344 U. S. 604, 97 L. ed. (Advance p. 355), 73 S. Ct. 481, 21 U. S. Law Week 4140. (No. 66, decided February 9, 1953.)

Petitioners and two others were indicted for conspiracy to commit substantive offenses and for conspiracy "to defraud the United States of and concerning its governmental function and right of administering" the immigration laws and the Immigration and Naturalization Service by obtaining the illegal entry into the United States of three aliens as spouses of honorably discharged veterans of the Armed Forces. The substantive counts were dismissed by the District Court because venue had not been shown in its district, another defendant was acquitted and the three petitioners were convicted on the conspiracy count. The Court of Appeals affirmed.

The facts may be summarized as follows: three of the defendants were aliens, refugees from Poland residing in France, and two were citizens of the United States who journeyed to France for the purpose of arranging marriages with the aliens in order to procure their admission to the United States under the terms of the so-called War Brides Act, 59 Stat. 659, 8 U.S.C. § 232. They agreed that the marriages would be in form only, solely for the purpose of enabling the three aliens to enter the United States; the couples were not to live together and were to take legal steps to dissolve the marriages as soon as possible.

The Supreme Court affirmed the convictions in an opinion written by Mr. Justice MINTON. The Court

Reviews in this issue by Rowland L. Young.

treated the issue of the validity of the French marriages as immaterial; pointing out that no one was being prosecuted for an offense against the marital relation, it said, "We consider the marriage ceremonies only as a part of the conspiracy to defraud the United States and to commit offenses against the United States. In the circumstances of this case, the ceremonies were only a step in the fraudulent scheme and actions taken by the parties to the conspiracy . . . [In enacting the War Brides Act] Congress did not intend to provide aliens with an easy means of circumventing the quota system by fake marriages in which neither of the parties ever intended to enter into the marital relationship." From this, the opinion reasoned that the statements by the aliens that they were married, omitting to explain the true nature of the marriage, carried "implications of a state of facts which were not in fact true".

Much of the evidence of the conspiracy had come from the testimony of the wives, and the petitioners urged that this should have been excluded under the common law rule that a wife cannot testify against her husband. To this, the Court replied that the reason for the common law rule was to protect the sanctity of the marital relationship. "In a sham, phoney, empty ceremony such as the parties went through in this case, the reason for the rule disqualifying a spouse from giving testimony disappears, and with it the rule."

Petitioners also contended that, since most of the evidence consisted of testimony as to their acts and declarations, some of which took place after the conspiracy ended, the testimony was erroneously admitted unless properly limited to the defendant who did the act or made the statement testified to. The Court agreed that the conspiracy itself had ended on December 5, 1947, when the last of the aliens was admitted to the country, but it held admissible acts of the defendants which took place after that date that were relevant to show the spuriousness of the marriages and the intent of the parties. Declarations made after the conspiracy ended were said to be inadmissible unless limited to the declarant. The Court found that only one such declaration had been admitted, and determined that that one instance was not a prejudicial error in the light of the remainder of the record.

Mr. Justice JACKSON, joined by Mr. Justice BLACK and Mr. Justice FRANKFURTER, wrote a dissenting opinion. The dissent took the position that the validity of the French marriages was crucial and argued that, from all that appeared, the marriages at worst were merely voidable, and not void. The dissent also disagreed with the ruling that the testimony of the wives was competent, declaring that the trial court was trying to lift itself by its bootstraps, since it "could only conclude that the marriage was a sham from the very testimony whose admissibility is in question". The admission of the testimony as to the acts and declarations taking place after the end of the conspiracy was also objected to, on the ground that the rule against admission of such testimony except as to a particular defendant should be observed in spirit as well as to the letter, and that its admission here violated a substantive right of the defendants.

The case was argued by A. Bradley Eben for petitioners, and by Marvin E. Frankel for the United States.

ARMY, NAVY AND AIR FORCE

Doctor Inducted as Medical Specialist Is Not Entitled to a Commission as a Matter of Law

■ *Orloff* v. *Willoughby*, 345 U. S. 83, 97 L. ed. (Advance p. 476), 73 S. Ct. 534, 21 U. S. Law Week 4215. (No. 444, decided March 9, 1953.)

Orloff was inducted into the Army under Section 454(i)(1)(A) of the Universal Military Training and Service Act, which authorizes conscription of certain "medical and allied specialist categories". His application for a commission was rejected when he refused to sign the loyalty certificate required of all commissioned officers and refused to answer questions about membership in the Communist Party, asserting his privilege against self-incrimination. He brought suit for habeas corpus seeking a discharge from the Army on the ground that he had not been given commissioned rank or assigned to duties within the specialized field for which he was drafted.

The trial judge denied the writ on the ground that Section 454 (i) (1) (A) does not require a person drafted under the "medical and allied specialist" categories to be assigned doctor's functions. The Court of Appeals affirmed, agreeing with the District Court that a doctor inducted under the statute is in the same status, so far as obedience to orders is concerned, as if he had been inducted under other conscription statutes.

Mr. Justice JACKSON, speaking for the Supreme Court, held that, while one inducted as a medical specialist must be used as such, petitioner was not entitled to a commission and that the courts had no power to discharge a lawfully mustered member of the Armed Forces because of alleged discriminatory or illegal treatment in the assignment of duties. In its argument before the Court, the Government had conceded that men drafted under the medical specialist category are entitled to duties generally within a doctor's field. The Court agreed, declaring that "To separate particular professional groups from the generality of the citizenship and render them liable to military service only because of their expert callings and, after induction, to divert them from the class of work for which they were conscripted would raise questions not only of bad faith but of unlawful discrimination. We agree that the statute should be interpreted to obligate the Army to classify specially inducted professional personnel for duty within the categories which rendered them liable to induction."

While recognizing that it has been a uniform practice to commission

doctors, the Court held that Orloff was nonetheless not entitled to a commission as a matter of law, since the granting of a commission is a matter solely within the discretion of the President as Commander in Chief and thus beyond the power of a court to control. The Court reasoned that Orloff could not "at the same time take the position that to tell the truth about himself would incriminate him and that even so the President must appoint him to a post of honor and trust".

The Court declared that it was beyond its power to determine by habeas corpus whether the specific assignment to duty of men lawfully inducted into the Armed Forces fell within the basic classification of the conscription statutes, and it refused to order Orloff discharged from the Army. "Nothing appears to convince us that he is held in the Army unlawfully and, that being the case, we cannot go into the discriminatory character of his orders." The matter of assignment to specific duty of military personnel was said to be necessarily a matter largely for the discretion of the Services, not subject to judicial review.

Mr. Justice BLACK wrote a dissenting opinion in which Mr. Justice DOUGLAS and Mr. Justice FRANKFURTER joined. This opinion stressed the point that Congress would not have passed the statute providing for the induction of doctors if it had not expected them to be commissioned.

Mr. Justice BLACK and Mr. Justice DOUGLAS also concurred in a dissenting opinion that Mr. Justice FRANKFURTER wrote. In his view, while the matter of granting commissions is solely at the discretion of the President, Congress is not precluded from drafting a special group into the Army on the condition that they be commissioned. He declared that members of such a group should be discharged if found unfit for a commission.

The case was argued by David Rein and Stanley Faulkner for Orloff and by Robert S. Erdahl for the respondent.

CIVIL SERVICE

Civil Service Rules Relating to Status and Tenure of Federal Hearing Examiners Upheld

■ *Ramspeck* v. *Federal Trial Examiners Conference*, 345 U. S. 128, 97 L. ed. (Advance p. 445), 73 S. Ct. 570, 21 U. S. Law Week 4199. (No. 278, decided March 9, 1953.)

This was a suit brought in a federal district court by the Federal Trial Examiners Conference, an unincorporated association, against the members of the Civil Service Commission and the National Labor Relations Board. They sought a declaratory judgment that certain rules relating to their promotion, compensation, tenure and the assignment of cases, promulgated by the Civil Service Commission, were invalid under Section 11 of the Administrative Procedure Act. The district court held that the rules were invalid, interpreting Section 11 as requiring (1) that hearing examiners employed by a particular federal agency must be placed in the same salary grade; (2) that a hearing examiner may not be promoted from one salary grade to another within the same agency; (3) that hearing examiners must be assigned to cases in mechanical rotation without regard to the difficulty or importance of particular cases or the competence or experience of particular examiners; and (4) that the employment of hearing examiners may not be terminated by reduction-in-force procedures where there is a lack of work or of funds with which to pay them. The court granted a permanent injunction against enforcement of the rules. The Court of Appeals affirmed *per curiam*, one judge dissenting.

The Supreme Court reversed in an opinion written by Mr. Justice MINTON. After reviewing the background of the situation that led to enactment of the Administrative Procedure Act, the Court concluded that in setting up several classifications of examiners in the same agency, the Commission was doing exactly what Congress had directed it to do. In support of this holding, the Court quoted the language of Section 11 directing that "Examiners shall receive compensation . . . in accordance with the Classification Act of 1923". It rejected the district court's characterization of the categories established as "nebulous and subjective", declaring that the categories were subjective of necessity and that Congress had committed the matter to the experience and expertise of the Commission, not the courts. The Court added that Congress itself had used classifications similar to those objected to in the Classification Act of 1949.

The second holding of the district court, that an examiner might not be promoted from one salary grade to another within the same agency, was dismissed on the theory that, if the Commission had the right to classify examiners within an agency, it followed that promotions could also be made within the agency. The Court declared that the promotions were made by the Commission, not the agency, and that the Commission had sufficient responsibility to ensure independent judgments from the examiners.

In rejecting the holding that the examiners were required to be rotated mechanically without regard to their experience or skill, the Court observed that "Congress did not provide for the classification of examiners by the Commission, and then provide for the Commission to ignore such classification by a mechanical rotation."

The district court's last holding was set aside on the ground that Congress had not intended to give examiners lifetime positions, subject only to removal for cause. The Court said: "Congress intended to provide tenure for the examiners in the tradition of the Civil Service Commission. They were not to be paid, promoted, or discharged at the whim or caprice of the agency or for political reasons." The opinion asserted that there was nothing in the language of the statute to support the position on this point urged by the examiners.

Mr. Justice BLACK, joined by Mr.

Justice DOUGLAS and Mr. Justice FRANKFURTER, wrote an opinion dissenting "for substantially the reasons given in the opinion of Chief Judge Laws of the District Court of the District of Columbia". The dissent declared that the effect of the classification system was to restore the unlimited discretion in the agencies that existed before the passage of the Administrative Procedure Act, and contended that the classifications set up were so nebulous "that the head of an agency is left practically free to select any examiner he chooses for any case he chooses."

The case was argued by Robert W. Ginnane for the petitioners, and by Charles S. Rhyne for the respondents.

COMMERCE

Production of Material To Be Used in Construction of Highway Used by Interstate Traffic Held To Be Production of Goods for Interstate Commerce Despite Fact That Material Never Leaves the State Where It Is Manufactured

■ *Alstate Construction Company* v. *Durkin*, 345 U. S. 13, 97 L. ed. (Advance p. 514), 73 S. Ct. 565, 21 U. S. Law Week 4235. (No. 296, decided March 9, 1953.)

■ *Thomas* v. *Hempt Brothers*, 345 U. S. 19, 97 L. ed. (Advance p. 518), 73 S. Ct. 568, 21 U. S. Law Week 4236. (No. 410, decided March 9, 1953.)

These cases involved the same point of law under the Fair Labor Standards Act and were decided on the same theory.

In No. 296, the Wage and Hour Administrator sued petitioner in a district court to restrain alleged violations of the overtime and record-keeping provisions of the Act. Petitioner contended that it was not "engaged in the production of goods for commerce" within the meaning of the statute. The district court found that petitioner was a Pennsylvania road contractor that rebuilds and repairs roads, railroads, parkways, etc., within the state. It also found that the company manufactures in Pennsylvania a bituminous concrete road-surfacing material called "amesite" from materials either bought or quarried in Pennsylvania. Most of this material is applied to Pennsylvania roads either by Alstate's employees or its customers. Eighty-five and one-half per cent of Alstate's work is done on interstate roads or railroads, or for Pennsylvania companies producing goods for interstate commerce. On the basis of these findings, the district court concluded that Alstate was covered by the Act and granted the injunction. The Court of Appeals affirmed.

In affirming for the Supreme Court, Mr. Justice BLACK rejected Alstate's contention that because none of its product was manufactured to be shipped across state lines, amesite was not produced "for commerce". The Court asserted that to accept this contention would require it to read the words "production of goods for commerce" as though written "production of goods for transportation in commerce". Since such limiting language had been deleted from the Act while it was pending before Congress, the Court refused to adopt that interpretation. It enunciated the rule, "He who serves interstate highways and railroads serves commerce. By the same token he who produces goods for these indispensable and inseparable parts of commerce produces goods for commerce."

The Court also rejected the argument that it should reverse because the statute had been given a contrary interpretation by its administrators from 1938 to 1945. The opinion observed that Congress had refused an invitation to return to the original interpretation in a debate on an amendment to the Act in 1949.

Mr. Justice DOUGLAS wrote a dissenting opinion in which Mr. Justice FRANKFURTER joined. The dissent objected that the Court's opinion extended the federal domain in the field far beyond the intention of Congress.

In No. 410, the respondent operated a stone quarry in Pennsylvania, using the stone in the manufacture of cement mixtures and then hauling the mixtures in trucks to customers in Pennsylvania for processing and use on projects within the state. Among the customers were the Pennsylvania Turnpike, the Pennsylvania Railroad, an airport, an army depot and a navy depot. Petitioner brought suit for overtime wages, liquidated damages and counsel fees under provisions of the Act. The Pennsylvania Supreme Court sustained the trial court's holding that the complaint failed to state a cause of action under the statute.

The Supreme Court, through Mr. Justice BLACK, reversed, citing its opinion in the *Alstate* case.

Mr. Justice FRANKFURTER and Mr. Justice DOUGLAS dissented for the reasons stated in the dissent to the *Alstate* case.

In No. 296, the case was argued by S. A. Schreckengaust, Jr., for the petitioner, and by Bessie Margolin for the respondent.

In No. 410, the case was argued by Henry C. Kessler, Jr., for petitioner and by James H. Booser for the respondent.

COMMERCE

City Tax on Vehicles That Transport Goods Both Within City and to Points Beyond State Borders Upheld Over Contention That Interstate Commerce Was Impeded

■ *Chicago* v. *Willett Company*, 344 U. S. 574, 97 L. ed. (Advance p. 333), 73 S. Ct. 460, 21 U. S. Law Week 4153. (No. 23, decided February 9, 1953.)

This case tested the validity of a tax levied by the City of Chicago on trucks operated within the city. The tax was levied on each truck annually and was graduated according to the size of the trucks, ranging from $8.25 on a two-ton truck to $16.50 on trucks of four tons or more. Respondent is an Illinois corporation whose place of business is in Chicago. It owns a fleet of trucks which it uses to transport goods within Chicago and between Chicago and other cities in and beyond Illinois.

It was stipulated that every single one of respondent's vehicles carries property each day which never leaves the city and property destined for some point outside the state. The city instituted this suit in an Illinois court when respondent failed to pay the tax. The court gave judgment for respondent which was affirmed by the Supreme Court of Illinois on a theory that the taxing ordinance ran afoul of the commerce clause of the Federal Constitution.

Mr. Justice FRANKFURTER, speaking for the Supreme Court of the United States, reversed. The Court held the tax to be unassailable under the authority of *New York Central Railroad* v. *Miller*, 202 U. S. 584, 50 L. ed. 1155, 26 S. Ct. 714, reaffirmed in *Northwest Airlines, Inc.* v. *Minnesota*, 322 U. S. 292, 88 L. ed. 1283, 64 S. Ct. 950. The Court distinguished cases relied upon by respondent, declaring "The central and decisive fact in this case is that respondent's business has, as much as any transportation business can have, a home. That home is Chicago. To the extent that respondent's business is not confined within the City's limits, it revolves around the City. It is fed by terminals for rail and sea transportation which the City provides. It receives, much more continuously than did the airline in the Northwest Airlines case or the railroad in the Miller case, the City's protection, and it benefits from the City's public services. In the circumstances, a tax of reasonable proportions such as the one in question not shown in fact to be a burden on interstate commerce, is not inconsistent with the Commerce Clause."

Mr. Justice REED, joined by the CHIEF JUSTICE, wrote a concurring opinion. In their view, it was immaterial whether the tax was expressly stated to be for the use of the highways or for other state services or protection rendered. "This is a charge obviously for the use of the highways of the City by the carters and therefore valid."

Mr. Justice DOUGLAS dissented, his short opinion arguing that the tax was in fact an occupational tax and therefore not constitutionally to be exacted for the privilege of engaging in interstate commerce.

The case was argued by Arthur Magid for the petitioner, and by Charles Dana Snewind for the respondent.

CONSTITUTIONAL LAW

Conviction of Making a Public Address in a Park in Violation of Local Ordinance Reversed

■ *Fowler* v. *Rhode Island*, 345 U. S. 67, 96 L. ed. (Advance p. 491), 73 S. Ct. 526, 21 U. S. Law Week 4223. (No. 340, decided March 9, 1953.)

An ordinance of the City of Pawtucket prohibits the making of public addresses in public parks. Appellant, a member of Jehovah's Witnesses, was arrested and fined $5 for addressing a gathering of members of that sect. The conviction was upheld by the Rhode Island Supreme Court.

On appeal to the Supreme Court, Mr. Justice DOUGLAS reversed. The opinion refused an invitation to overrule *Davis* v. *Massachusetts*, 167 U. S. 43, 42 L. ed. 71, 17 S. Ct. 731 (which sustained a conviction for making a speech on the Boston Commons in violation of an ordinance that forbade the making of a public address without a permit from the mayor), and rested its decision upon a concession by the State that the Pawtucket ordinance did not prohibit church services in the park. The Court reversed the conviction on the ground that the conviction of petitioner amounted to the State's preferring one religion over another, in violation of the First and Fourteenth Amendments.

It was noted that Mr. Justice FRANKFURTER concurred in the opinion of the Court "except insofar as it may derive support from the First Amendment. For me it is the Equal-Protection-of-the-Laws Clause of the Fourteenth Amendment that condemns the Pawtucket ordinance as applied in this case."

Mr. Justice JACKSON concurred in the result.

The case was argued by Hayden C. Covington for appellant, and by Raymond J. Pettine for the appellee.

EVIDENCE

Privilege Against Disclosure of Military Secrets Bars Production of Official Report of Crash of Air Force Bomber

■ *United States* v. *Reynolds*, 345 U. S. 1, 97 L. ed. (Advance p. 519), 73 S. Ct. 528, 21 U. S. Law Week 4237. (No. 21, decided March 9, 1953.)

Consolidated suits against the United States were brought under the Tort Claims Act for the death of three civilians killed in the crash of a B-29 at Waycross, Georgia, in 1948. The plane was testing secret electronic equipment at the time of the accident in which six of the nine crew members and three of the four civilian observers aboard were killed.

During pretrial, plaintiffs moved, under Rule 34 of the Federal Rules of Civil Procedure, for production of the Air Force's official accident investigation report and the statements of the three surviving crew members. The Government resisted the motion, claiming that the subject matter was privileged against disclosure under Air Force Regulations. The District judge rejected the claimed privilege on the theory that the Tort Claims Act had waived any privilege based on executive control over governmental documents. The Secretary of the Air Force then signed a "formal claim of privilege", and the Judge Advocate General of the Air Force filed an affidavit which asserted that the material could not be furnished "without seriously hampering national security, flying safety and the development of highly technical and secret military equipment". The affidavit also offered to produce the surviving crew members, without cost, for examination by the plaintiffs. The Government refused to produce the documents so that the court could examine them in order

to determine whether they contained privileged matter, and the court entered an order under Rule 37 (b)-(2)(i) declaring that the facts on the issue of negligence would be taken as established in plaintiff's favor. After a hearing, final judgment was entered for plaintiffs. The Court of Appeals affirmed.

The CHIEF JUSTICE delivered the opinion of the Supreme Court reversing and remanding. The Court declared that Rule 34 required only production of matters "not privileged" and that the privilege against revealing military secrets is well established in the law of evidence. The opinion examines the scope of the privilege closely, saying that it "belongs to the Government and must be asserted by it; it can neither be claimed nor waived by a private party. It is not to be lightly invoked. There must be a formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by that officer." The Court was careful to make it plain that neither an automatic requirement of complete disclosure nor an abdication of judicial control to the executive officers was a satisfactory rule. It was said that the court should be satisfied from all the circumstances of the case that there was a reasonable danger of disclosure of military information, and that, when this is the case, the court should not jeopardize the security which the privilege protects by insisting upon an examination of the evidence.

In the instant cases, the opinion concluded, the necessity for the production of the documents was greatly minimized by the Air Force's offer to produce the surviving crew members and plaintiff's failure to accept that offer "posed the privilege question for decision with the formal claim of privilege set against a dubious showing of necessity".

It was noted that Mr. Justice BLACK, Mr. Justice FRANKFURTER and Mr. Justice JACKSON dissented "substantially for the reasons set forth in the opinion of Judge Maris below".

The case was argued by Samuel D. Slade for petitioners, and by Charles J. Biddle for respondents.

LABOR LAW

Employer Is Not Guilty of Unfair Labor Practice When It Discharges Employee Who Refused to Cross Picket Line Where Collective Bargaining Agreement Barred Such Refusal

■ *National Labor Relations Board* v. *Rockaway News Supply Company*, 345 U.S. 71, 97 L. ed. (Advance p. 470), 73 S. Ct. 519, 21 U. S. Law Week 4212. (No. 318, decided March 9, 1953.)

In this case, the Court ordered cancellation of an order of the National Labor Relations Board directing respondent to reinstate one Waugh in its employment and make him whole for an unlawful discharge. Waugh was a driver of respondent; his duties included picking up and delivering newspapers and other publications. He was discharged when he refused to cross a picket line established by a printers' union around the plant of one of the newspapers on his route. Like respondent's other employees, Waugh was a member of the newspaper deliverers' union which had a collective bargaining agreement with respondent. This agreement contained a union-security clause not conditioned upon a vote of the employees as required by Section 9 (e) of the Labor Management Relations Act. The agreement contained a no-strike, no-lock-out clause. Waugh was the only employee of the respondent who refused to cross the picket line. The case was heard by an arbitration board set up under the terms of the collective bargaining agreement. The arbitration board made an award in favor of the employer. Waugh then filed the charge of an unfair labor practice which led to this proceeding. The National Labor Relations Board not only ordered Waugh reinstated, but also held the entire collective bargaining agreement between respondent and the newspaper deliverers' union to be invalid since there had been no election under the auspices of the Board. The Court of Appeals set aside the order.

The Supreme Court affirmed in an opinon written by Mr. Justice JACKSON. The Court pointed out that Waugh's refusal to cross the picket line was not in obedience to any action by his union and that there was nothing in the situation that showed any hostility to labor organizations on the part of the company. The Court disagreed with the Board's ruling that the entire collective bargaining agreement, relied upon as a defense to the unfair labor practice charge by the respondent, was null and void. First, the Court noted, the agreement had been negotiated in good faith and both union and employer believed it to be valid at the time of the incidents that led to Waugh's discharge. Second, the Court disapproved of the Board's position because it ignored the savings and separability clause of the bargaining agreement. There was nothing in the Labor Management Relations Act that required invalidation of the entire agreement, the Court held, and indeed the contract as a whole "shows respect for the law and not defiance of it". The Court added that it considered "this controversy to require no determination of rights or duties respecting lines broader than this contract itself provides."

Mr. Justice BLACK, with whom Mr. Justice DOUGLAS and Mr. Justice MINTON concurred, wrote a short dissent which declared that there was nothing in the language of the collective bargaining agreement that justified the discharge of an employee because he refused to cross a picket line, a refusal held to be a right protected by Section 8 (b) (4) (D) of the Act.

The case was argued by Frederick U. Reel for the petitioner, and by Julius Kass for the respondent.

LABOR LAW

Custom of "Setting Bogus" in Printing Industry Held Not To Be an Unfair Labor Practice under the Taft-Hartley Law

■ *American Newspaper Publishers Association* v. *National Labor Relations Board,* 345 U. S. 100, 97 L. ed. (Advance p. 455), 73 S. Ct. 552, 21 U. S. Law Week 4204. (No. 53, decided March 9, 1953.)

This case and its companion, *National Labor Relations Board* v. *Gamble Enterprises,* reviewed below, presented questions under Section 8 (b) (6), the so-called antifeatherbedding clause, of the Labor Management Relations Act. In this case, the petitioner was a New York corporation whose membership includes more than 800 newspaper publishers representing over 90 per cent of the circulation of daily newspapers in the United States. In 1947, the Association filed charges with the National Labor Relations Board against the International Typographical Union charging it with engaging in unfair labor practices. One of the practices objected to was the custom of "setting bogus", a recognized practice of the printing industry whereby duplicates of advertisements produced from plates or mats set elsewhere are set up by local printers and then promptly destroyed. The trial examiner recommended that the ITU be ordered to cease and desist from several practices, but that the featherbedding charges be dismissed. The Board accepted the recommendation and the Court of Appeals for the Seventh Circuit affirmed.

Mr. Justice BURTON wrote the opinion of the Supreme Court affirming on the ground that setting bogus was not an unfair labor practice within the meaning of Section 8 (b) (6). The opinion declared that the legislative history of the Act demonstrated that Congress had decided o limit featherbedding practices "but little". The Court pointed out that the statutory language limits its condemnation of featherbedding to "instances where a labor organization or its agents exact pay from an employer in return for services not performed or not to be performed". The Court reasoned that a situation such as this, where the work was actually done by the employees, was not included within the bar of the statutory definition.

Mr. Justice DOUGLAS wrote a dissenting opinion in which he compared this case and the *Gamble Enterprises* case *infra.* In his view, the *Gamble* case was not covered by the statute because Congress had felt that it was not practical to give a board or a court "the power to say that so many men are all right, and so many men are too many", whereas in the newspaper case, the practice of setting bogus was unwanted, useless work which was of no service to the newspaper and accordingly proscribed by the Act. He disagreed with the "time-honored custom" distinction proposed by Mr. Justice JACKSON in the dissenting opinion in the *Gamble* case, on the ground that it was a distinction not supported by the statutory language.

Mr. Justice CLARK wrote a dissenting opinion in which the CHIEF JUSTICE joined. In their view, the Court's holdings turned Section 8 (b) (6) into a hollow phrase, since "an imaginative labor organization need not strain far to invent such 'work' ".

The case was argued by Elisha Hanson for the petitioner, and by Bernard Dunau for the respondent.

LABOR LAW

Union's Insistence on Hiring Local Musicians To Play at All Performances of Traveling Orchestras Held Not To Be an Unfair Labor Practice

■ *National Labor Relations Board* v. *Gamble Enterprises, Inc.,* 345 U. S. 117, 97 L. ed. (Advance p. 646), 73 S. Ct. 560, 21 U. S. Law Week 4209. (No. 238, decided March 9, 1953.)

This case is a companion to *American Newspaper Publishers Association* v. *National Labor Relations Board,* decided on the same day (see the review above). Here, the manager of a chain of theatres charged the American Federation of Musicians with an unfair labor practice under Section 8 (b) (6) of the Labor Management Relations Act. The practice complained of was the union's insistence that a local orchestra should be employed to play overtures, intermissions and chasers at each performance at which a traveling orchestra appeared. The union sought to enforce this demand by refusing to consent to the appearance of the traveling orchestra unless the local musicians were hired. Since the union includes practically all the instrumental musicians in the country, it had successfully prevented respondents from obtaining out-of-town orchestras without meeting the union's demands. The trial examiner concluded that the union's conduct "was nothing more or less than a proposal for a stand-by engagement", a practice forbidden by the Labor Management Relations Act, but since he was not convinced that the union's demands were "an attempt to cause" any payment to be made "in the nature of an exaction" he recommended that the complaint be dismissed. The Board dismissed the complaint, holding that the union was seeking actual employment for its members. The Court of Appeals for the Sixth Circuit set aside the Board's order of dismissal and remanded.

Speaking for the Supreme Court, Mr. Justice BURTON reversed. The Court accepted the Board's theory that the union's proposals were made in good faith to obtain the performance of actual services by its members, and therefore did not amount to a practice banned by Section 8 (b) (6). "It has remained for respondent to accept or reject the union's offers on their merits in the light of all material circumstances. We do not find it necessary to determine also whether such offers were 'in the nature of an exaction.' We are not dealing here with offers of mere 'token' or nominal services."

Mr. Justice JACKSON wrote a dissenting opinion in which he com-

pared this case with the newspaper case. In his view the difference between the two lay in the fact that the printers' union was adhering to "an old custom which mutual consent established and for years maintained and to which other terms of employment have long since been adjusted", whereas the musicians' union had devised a new expedient "to perpetuate a union policy in the face of its congressional condemnation".

Mr. Justice CLARK also wrote a dissenting opinion in which the CHIEF JUSTICE joined. This dissent rested on the dissent in the newspaper case. It rejected Mr. Justice JACKSON's view, saying that the statute "does not distinguish between modern make-work gimmicks and featherbedding techniques encrusted in an industry's lore."

The case was argued by Bernard Dunau for the petitioner, and by Frank C. Heath for the respondent.

LIMITATION OF ACTIONS

Statute of Limitations in Portal-to-Portal Act Applies to Liquidated Damages Claims Under the Walsh-Healey Act

■ *Unexcelled Chemical Corporation* v. *United States*, 345 U. S. 59, 97 L. ed. (Advance p. 486), 73 S. Ct. 580, 21 U. S. Law Week 4220. (No. 293, decided March 9, 1953.)

The United States brought this action to recover liquidated damages under the Walsh-Healey Act, 49 Stat. 2036, as amended, 41 U.S.C. § 35 *et seq.*, which provides that a contractor furnishing the Government with materials worth $10,000 or more must meet specified labor standards. One of these standards prohibits the use of child labor. In 1947, the Secretary of Labor issued a complaint charging petitioner with knowingly employing child labor during 1942-1945 in violation of the Act. The action, based on the complaint, was filed in the district court in 1950. The answer pleaded the two-year statute of limitations contained in Section 6 of the Portal-to-Portal Act of 1947 as a bar. Both parties moved for summary judgment. The district court granted petitioner's motion, holding that the cause of action arose when petitioner violated the statute and that therefore the two-year period had begun to run in 1945. The Court of Appeals reversed, on the theory that actions to enforce the child-labor provisions of the Walsh-Healey Act are not barred by the limitation period in the Portal-to-Portal Act.

The Supreme Court reversed in a unanimous opinion written by Mr. Mr. Justice DOUGLAS. The decision rested on the literal language of the Portal-to-Portal Act, which covers three types of causes of action—claims for "unpaid minimum wages", claims for "unpaid overtime compensation", and claims for "liquidated damages" under three statutes, one of which is the Walsh-Healey Act. The Court pointed out that the only sort of "liquidated damages" collectible under the Walsh-Healey Act are the sort of damages at issue in this case, and it concluded that such precise language made unnecessary any extended inquiry into the legislative history of the Portal-to-Portal Act.

The opinion rejected an argument that the "cause of action accrued within the meaning of the Portal-to-Portal Act," when the Department of Labor determined that the contractor was liable for liquidated damages, or at any rate when the administrative proceedings were initiated. The Court declared that a cause of action is normally created when there is a breach of a duty owed to the plaintiff and that that usage is too familiar to assume that Congress did not intend to use the words in their ordinary sense.

The case was argued by George Morris Fay for the petitioner, and by James R. Browning for the respondent.

STATUTES

Suit in Federal Court To Test Validity of State Communist Control Bill Stayed To Await Interpretation by State Courts

■ *Albertson* v. *Millard*, 345 U.S. 242, 97 L. ed. (Advance p. 539), 73 S. Ct. 600, 21 U. S. Law Week 4270. (No. 384, decided March 16, 1953.)

In this case, Albertson, the Executive Secretary of the Communist Party of Michigan, challenged the constitutionality of the Michigan Communist Control Act on the ground that its provisions and definitions were void for vagueness. The Act was signed by the governor on April 17, 1952, and this complaint was filed five days later in a United States District Court in Michigan, seeking a declaratory judgment and an injunction to prevent state officials from enforcing the Act. A three-judge district court found the act to be constitutional, and this appeal followed.

In a *per curiam* opinion, the Supreme Court vacated the judgment and remanded the cause to the district court with directions. The opinion noted that there had been no construction of the statute by the state courts and that it was deemed appropriate for the state courts to construe the statute before the district court proceeded further.

Mr. Justice BLACK dissented without opinion.

Mr. Justice DOUGLAS wrote a dissenting opinion in which he argued that the case was ripe for consideration and that there was no need to wait for action by the state courts.

The case was argued by Ernest Goodman for the appellants and by Edmund E. Shepherd for appellees.

UNITED STATES

City Occupational Tax Held Applicable to Employees of Federal Plant Over Which the United States Has Exclusive Jurisdiction

■ *Howard* v. *Commissioners of the Sinking Fund of the City of Louisville*, 344 U. S. 624, 97 L. ed. (Advance p. 338), 73 S. Ct. 465, 21 U. S. Law Week 4146. (No. 295, decided February 9, 1953.)

This case raised the question of the power of the City of Louisville to levy an occupational tax on employees of a naval ordnance plant over which the United States had

exclusive jurisdiction. The ordnance plant was located on land acquired by the United States in condemnation proceedings in 1941. The Federal Government accepted exclusive jurisdiction and the Governor of Kentucky acknowledged this acceptance. The City annexed the territory on which the plant was located in 1947 and 1950, without challenge from the United States. This suit was filed in a state court by employees of the plant seeking a declaratory judgment that the plant was not located within the City of Louisville and that its employees were therefore not subject to the tax. An injunction was prayed for. The court overruled appellee's general and special demurrers and, in the absence of further pleadings by the City, granted judgment for appellants and an injunction restraining enforcement of the taxing ordinance. The Kentucky Court of Appeals reversed.

On appeal to the Supreme Court, the judgment of the Court of Appeals was affirmed by Mr. Justice MINTON. The Court rejected the contention that the City's annexation of the federal area was invalid, saying that that area did not cease to be part of Kentucky when it became the property of the United States, and that the change in municipal boundaries did not in the least interfere with the federal jurisdiction.

The Court held that the City was granted the right to tax the income paid to employees of the United States at the plant by the Buck Act, 4 U.S.C. §§ 105-110. It rejected the argument that the City's occupational tax was not an "income tax" within the meaning of the Buck Act, despite a prior holding by the Kentucky courts that the tax was not an income tax under Kentucky law. The Court said that the Buck Act's definition of "income tax" was different from the definition in the Kentucky statute.

Mr. Justice DOUGLAS, joined by Mr. Justice BLACK, wrote a short opinion dissenting on the ground that the City's tax was not an "income tax" within the meaning of the Buck Act, but rather a tax on the privilege of working in the City.

The case was argued by W. A. Armstrong for the appellants, and by Gilbert Burnett and Alex P. Humphrey for the appellees.

UNITED STATES

Witness' Refusal To Divulge Information to Congressional Committee Upheld

■ *United States* v. *Rumely*, 345 U.S. 41, 97 L. ed. (Advance p. 494), 73 S. Ct. 543, 21 U. S. Law Week 4224. (No. 87, decided March 9, 1953.)

Rumely, the secretary of an organization called the Committee for Constitutional Government, refused to disclose to the House Select Committee on Lobbying Activities the names of persons who make bulk purchases of books published by the committee. He was convicted under R. S. § 192, which provides penalties for refusal to give testimony or to produce relevant papers "upon any matter" under congressional inquiry. The Court of Appeals reversed, one judge dissenting, on the ground that the committee had no authority to compel production of the information.

The opinion of the Supreme Court, written by Mr. Justice FRANKFURTER, avoided the question of the scope of congressional power to investigate by adopting the Court of Appeals' view that the House itself had not authorized the committee to exact disclosure of the information that Rumely refused to divulge. In arriving at its decision, the Court relied upon the rule that legislation should be construed if possible so as to avoid a serious doubt of constitutionality, holding that that rule applied *a fortiorari* to congressional resolutions.

The Government contended that the Committee had been authorized to inquire into all efforts of private individuals to influence public opinion through books and periodicals, however remote the radiations of influence which they may exert upon the ultimate legislative process. The Court rejected this argument, saying that it would raise serious doubts under the First Amendment if adopted. The meaning of "lobbying activities" was held to be restricted to "representations made directly to the Congress, its members, or its committees".

Mr. Justice BURTON and Mr. Justice MINTON took no part in the consideration or decision of the case.

A concurring opinion by Mr. Justice DOUGLAS, joined in by Mr. Justice BLACK, took the view that Congress had authorized the actions of the Committee and that, in doing so, it had exceeded the bounds of the First Amendment.

The case was argued by Oscar H. Davis for the United States, and by Donald R. Richberg for Rumely.

Courts, Departments and Agencies

George Rossman • **EDITOR-IN-CHARGE** **Richard B. Allen** • **ASSISTANT**

Attorney and Client . . . contingent fee contract in divorce case.

▪ The Supreme Court of Washington has adopted the almost universal rule that an attorney-and-client contingent fee contract in a divorce action is unlawful. Since the proceeding, however, was one in which the Board of Governors of the Washington State Bar Association sought to reprimand the attorney, the Court had to go further and make a first impression decision that such a contract was not one "sanctioned by law" as that term is used in Canon 13 of the Canons of Professional Ethics. But despite this holding, the Court refused the reprimand because it was not until after the controversy arose that the state association's Committee on Legal Ethics ruled that such an arrangement was unethical.

The Court exhaustively cited the cases holding a contingent fee contract in a divorce suit unlawful as against public policy, but noted that all the cases arose from civil actions to enforce the contracts, and not from proceedings to discipline the attorney. Two reasons seem to dominate the cases holding such contracts to be against public policy: (1) that they tend to prevent reconciliation, and (2) that they prevent the judge from determining proper alimony and support payments.

In the instant case, while the contract (which was in writing) was far from clear, it was apparently construed as allowing the attorney 20 per cent of all money he was able to secure for his client, whether in the form of payments ordered by the court or in property obtained through a voluntary property settlement. This was to be in addition to the amount of fees he would be allowed by the opposing side.

(In Re Smith, Sup. Ct. Wash., March 10, 1953, Hamley, J., 254 P. 2d 464.)

Civil Service . . . eligibility of signer of Communist Party nominating petition.

▪ Signing a Communist Party nominating petition is in itself not sufficient cause for the Municipal Civil Service Commission of the City of New York to strike the signer from the eligible list for police patrolmen, a New York court has held in ordering the Commission to restore to its eligible list the name of a Negro who rather unwittingly in 1949 signed a nominating petition for Benjamin Davis for nomination as City Councilman on the Communist Party ticket, when at the time Davis was being tried for conspiracy to violate the Smith Act.

In his affidavit and in his testimony before the Commission on hearing, the petitioner stated that he was not a Communist or an adherent to the Party's principles, and that he had been asked to sign the petition because he was a Negro and as a protest against racial prejudice. Noting that there was no proof against the petitioner of Party membership or adherence, and referring to the Supreme Court's recent decision in *Wieman* v. *Updegraff,* 344 U.S. 183, in which an Oklahoma loyalty oath statute was found unconstitutional because it indiscriminately classified innocent and knowing membership in organizations designated subversive by the Attorney General, the Court said: "If innocent membership cannot be ground for disqualification from public employment, how can complete absence of membership justify it?"

The Court recognized "today's acute international situation and the dangers of treachery from within", but declared: "Happily, we have not reached—and fervently we hope that we never shall—the 'awful' paradox that may confront a democratic government in time of war—the need of curbing temporarily civil liberties in order to preserve them in the end."

(*Hamilton* v. *Brennan et al.,* N.Y.S.Ct., Special Term, February 18, 1953, Hofstadter, J., 119 N. Y. S. 2d 83.)

Conflict of Laws . . . more on the doctrine of divisible divorce.

▪ In 1948 the United States Supreme Court spelled out the so-called divisible divorce doctrine. In *Estin* v. *Estin,* 334 U.S. 541, the Court held that where a wife domiciled in New York had there obtained a separate maintenance decree awarding her permanent alimony and her husband thereafter obtained a divorce in Nevada on constructive service, the Nevada decree did not extinguish the husband's obligation under the New York support order. The Court declared that New York could continue to enforce its decree without impairing the validity or effect of the Nevada decree for other purposes and without violating the full faith and credit clause of the Constitution.

Faced with an analogous set of facts, the Court of Appeals for the District of Columbia Circuit has read the *Estin* case as merely giving power to a sister jurisdiction to compel payment of support money to a resident entitled to it, except for a foreign divorce decree, but not as

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Editor's Note: Virtually all the material mentioned in the above digests appears in the publications of the West Publishing Company or in The United States Law Week.

obliging the sister jurisdiction to do so. It is a matter of public policy for each state to determine for itself, the Court said, and the District of Columbia policy, "based on principles of comity, requires the wife to seek alimony in the jurisdiction granting the divorce."

(*Meredith* v. *Meredith*, C.A. D.C., April 9, 1953, Clark, J.)

Constitutional Law . . . equal protection of the laws.

■ The Supreme Court of Florida has settled a tricky question of constitutional law which, in the words of the Court, involved "plain rooster fighting and cock fighting". Plaintiffs, who were breeders of game and fighting cocks, sought a declaratory judgment against the Sheriff of Dade County that their activities did not violate the state's cruelty to animals statute. That statute prohibits such cruelty, but by its own terms excludes its application "to poultry shipped on steamboats or other crafts". The Court held that the classification of cock fighting on a steamboat and cock fighting on land was unreasonable and arbitrary and denied the plaintiffs the equal protection of the laws to which they were constitutionally entitled.

(*Mikell et al.* v. *Henderson*, Sup. Ct. Fla., February 27, 1953, Mathews, J., 63 So. 2d 508.)

Courts . . . special referees appointed in New York.

■ As a temporary measure to expedite disposition of personal injury suits, the Supreme Court of New York County (the court of original jurisdiction in that state) has appointed a panel of twenty-five attorneys who will sit as special referees in three new nonjury parts established in the Court. At present there are four regular nonjury parts in New York County presided over by Supreme Court justices.

The members of the special referee panel were recommended by The Association of the Bar of the City of New York, the New York County Lawyers Association and the Bronx County Bar Association. Each will serve without compensation for a continuous period of thirty days. Cases will come before them only by stipulation of the parties.

David W. Peck, Presiding Justice of the Appellate Division, First Department, said that the Court did not have the facilities "to provide a prompt trial by the slow process of jury trial", but that the plan for additional nonjury parts "guarantees to all claimants in personal injury actions a fair and prompt trial".

The plan is contemplated as a temporary expedient pending possible adoption this year by the state's voters of a constitutional amendment permitting the assignment of judges across court lines according to availability and needs.

[For previous comment by Justice Peck concerning calendar congestion arising from personal injury suits, see 39 A.B.A.J. 322; April, 1953.]

Crimes . . . amount of bail.

■ In determining bail there is "a considerable latitude between a figure which is clearly inadequate and one which is clearly excessive", the Court of Appeals for the Eighth Circuit has declared in restating federal law applicable to bail and the constitutional injunction that excessive bail shall not be required. Problems relating to the amount of bail are essentially for trial judges, the Court said, and when the amount is within the extremes of high and low, an appellate court should not substitute its judgment for that of the trial court.

The case involved four defendants indicted for conspiracy to violate the Smith Act [18 U.S.C.A. §2385]. Bail, upon arrest, had been fixed at $40,000 for one and $25,000 for each of the other three. The district court subsequently reduced it to $15,000 for one and $10,000 for each of the others. These bails were posted and defendants released. The present case arose on their motions for further reductions.

(*Forest et al.* v. *U.S.*, C.A. 8th, April 8, 1953, Sanborn, J.)

Divorce . . . declaratory judgment to test Nevada decree.

■ Use of the declaratory judgment remedy to test the service-by-publication jurisdiction of a Nevada court to grant a divorce has been approved by the Appellate Division of the New York Supreme Court, First Department. A wife had obtained a separate maintenance decree in New York and later the husband obtained a divorce in Nevada in an action in which the wife was served by publication. Then the wife sought a declaratory judgment in New York that the Nevada decree was invalid. Personal service on the husband was had in the latter action.

Adverting to the *Williams* cases [*Williams* v. *North Carolina*, 317 U.S. 287 and 325 U.S. 226] in which the Supreme Court held in effect that a Nevada constructive service divorce decree was entitled to full faith and credit but that Nevada jurisdiction was open to collateral attack, the Court in the instant case ruled that New York should not hesitate to pass upon the validity of the husband's domicile in Nevada and that a declaratory judgment action was a proper vehicle for such inquiry. "Our courts are under a duty to protect the marital status of a wife domiciled in this state by declaring her rights when there is an open claim that she is no longer the lawful wife of the man to whom she was married", the Court said.

(*Long* v. *Long*, N.Y.S.C. App. Div., 1st Dept., February 24, 1953, Cohn, J., 119 N.Y.S. 2d 341.)

Divorce . . . what constitutes cruelty in Georgia?

■ A bit of Scottish rhyme, attributed to Burns but never claimed by him, and one of Solomon's wisdoms, were recently quoted by the Supreme Court of Georgia. The Burns was:

> I married with a scolding wife,
> The fourteenth of November;
> She made me weary of my life
> By one unruly member.

and the Solomon quotation was *Proverbs* 21:19:

> It is better to dwell in the wilder-

ness, than with a contentious and angry woman.

The Court was considering whether a husband's contentions that his wife denied him "conjugal rights" and was constantly "fussing and nagging" alleged actions constituting "wilful infliction of pain, bodily or mental", under the Georgia divorce statute. The holding was that while neither might be ground in itself, they were elements of the whole marital relationship to which a jury could properly give consideration in determining whether statutory grounds existed.

(*Hinkle* v. *Hinkle,* Sup.Ct.Ga., February 9, 1953, rehearing denied February 25, 1953, Head, J., 74 S.E. 2d 657.)

Governmental Reorganization . . . creation of Department of Health, Education and Welfare.

■ By a promulgation under the provisions of the Reorganization Act of 1949, effective April 11, 1953, pursuant to a joint resolution of Congress [P.L. 13, 83d Congress], the President has created a new executive department of the Federal Government—the first completely new cabinet post since 1903. The new department is the Department of Health, Education and Welfare, whose head is a Secretary having cabinet rank. The department will contain, in addition to the Secretary, an Under Secretary, two Assistant Secretaries, a Special Assistant to the Secretary (Health and Medical Affairs) who shall be a recognized leader in the medical field "with wide non-governmental experience", and a Commissioner of Social Security. These appointments are to be made by the President by and with the advice and consent of the Senate. The Federal Security Agency is abolished and its functions and agencies are transferred to and integrated with the new department. Also abolished are the former posts of Federal Security Administrator and Social Security Administrator.

(*Reorganization Plan No. 1 of 1953,* 18 Fed. Reg. 2053, April 11, 1953, F.R.Doc. 53-3174.)

Husband and Wife . . . interspouse action for tort arising before marriage.

■ A California court has held that a married woman may maintain an action in tort against her husband for personal injuries incurred prior to the marriage. The Court declined to decide whether the common law rule that a wife may not sue her husband in tort is still the law of California, but chose to determine the case on the rationale of the state's property law.

The Court ruled that the injuries constituted a thing in action and that a thing in action was property. It was further held to be the wife's separate property because it arose before the marriage, and that as separate property of the wife she could assert it without regard to the "fortuitous circumstance" of whether the defendant was her husband or a third party.

The fact that the husband carried liability insurance at the time of the accident was immaterial, the Court said.

(*Carver* v. *Ferguson,* Calif. D.C. App., 3d Dist., January 27, 1953, hearing granted March 26, 1953, Peek, J., 254 P. 2d 44.)

Indictment and Information . . . sufficiency to charge perjury.

■ The Court of Appeals for the Fifth Circuit has reaffirmed (in a two-to-one holding) its position that in an indictment for perjury under the federal statute [18 U.S.C.A. §1621] it is necessary to allege who administered the oath and what authority that person had to administer it. In so holding, the Court followed its own decision in *Hilliard* v. *U.S.,* 24 F. 2d 99, and rejected the contention that since *Hilliard* was decided under a repealed statute and prior to adoption of Rule 7(c) of the Federal Rules for Criminal Procedure, that that case could no longer be controlling.

(*U.S.* v. *Debrow et al.,* C.A. 5th, April 10, 1953, Borah, J.)

Labor Law . . . non-Communist affidavits.

■ The National Labor Relations Board has no authority to inquire into the truth or falsity of the non-Communist affidavits that union officials are required to file under the Taft-Hartley Act [29 U.S.C.A. §159 (h)]. So the United States District Court for the District of Columbia has held in the first case on the point.

Officers of the unions in question had filed the required affidavits from 1949 through 1952. In 1952, however, a grand jury in the Southern District of New York returned a presentment reporting that a number of the officials, in appearance before the jury, had refused to state whether the affidavits were true or false on the ground of constitutional privilege against self-incrimination. The grand jury recommended action by the NLRB.

The Board then propounded additional questions to the officers, asking them to reaffirm by affidavit their previous affidavits and to state that since the filing of the first affidavit they had not been members of the Communist Party or of a proscribed organization. The officers refused to do so and sought an injunction against the Board.

In granting a permanent injunction the Court found in examining the legislative history of the Act that investigative powers in this respect have been deliberately denied the Board, and ruled that a grand jury could not confer such powers on the Board.

(*United Electrical, Radio & Machine Workers of America, (UE) et al.* v. *Herzog et al.,* U.S.D.C.D.C., January 27, 1953, Letts, J., 110 F. Supp. 220.)

Lotteries . . . radio and television give-away programs.

■ The three major broadcasting networks have successfully challenged a proposed Federal Communications Commission ruling that would have cost radio and television stations their licenses had they continued carrying so-called give-away programs by which members of the listening or viewing audience may win prizes by listening to or viewing a certain program, by correctly answering a ques-

tion whose answer has been previously broadcast, or by answering a telephone call or writing a letter in a manner prescribed by a broadcast.

The Commission, in proposing adoption of the rules, had attempted to implement the provisions of the federal lottery statute [18 U.S.C.A. §1304] which makes punishable by fine and imprisonment anyone who broadcasts any advertisement or information concerning a lottery "offering prizes dependent in whole or in part upon lot or chance...." Holding that the word "lottery" should be given its usual and popular meaning, a three-judge United States District Court in the Southern District of New York, with one judge dissenting, ruled that to constitute such a lottery as proscribed by the statute there must be consideration furnished by the participant. The Court then went on to reject the FCC's contention that consideration would consist of listening to or viewing a certain program or of sitting by the telephone in anticipation of being called.

The Court opined that "when the radio or television audiences tire of them [give-away programs], they will make their exit. But the Commission cannot hurry them off by characterizing certain features of the 'give-away' programs as lotteries, if as a matter of law they are not."

(*American Broadcasting Co. et al.* v. *U. S.*, U.S.D.C. S.D. N.Y., February 5, 1953, Leibell, J., 110 F.Supp. 374.)

Navigable Waters . . . riparian rights.

■ In Michigan the riparian rights of an owner of land bordering an inland but navigable lake extend to the center of the lake even though the water at some points may be so deep as to make the subaqueous lands not usable, according to the Supreme Court of that state. These rights, the Court pointed out in a recent case, are subject to the rights of other riparian owners to use the lake for boating and fishing and are also subject to an easement in the public for navigation. But that easement does not extend to or include the right to anchor a vessel permanently off the owner's shore, and therefore in the instant case the riparian owners were granted an injunction against the owners of a raft which was kept anchored to the plaintiff's subaqueous land and used commercially as a place from which persons could fish.

(*Hall et al.* v. *Wantz*, Sup. Ct. Mich., March 10, 1953, Dethmers, C.J., 57 N.W. 2d 462.)

Negligence . . . *res ipsa loquitur*.

■ The doctrine of *res ipsa loquitur* is correctly applied to a case where the plaintiff suffered personal injuries after receiving an electrical shock from a public telephone which he was using to make a call. This is the ruling of the New York Supreme Court, Appellate Division, Third Department, which observed that "such incidents do not happen if reasonable care is used in the installation, maintenance and control of telephone lines".

(*Seeley* v. *New York Telephone Co.*, N.Y.S.Ct.App.Div., 3d Dept., March 13, 1953, Foster, J. 120 N.Y.S. 2d 262.)

■ An appellate court in Louisiana has reaffirmed the position of that state that the doctrine of *res ipsa loquitur* may be applied against the bottler in the familiar exploding bottle case, even where the bottle has passed to the plaintiff's possession from the bottler and the retailer. Even assuming the doctrine did not apply, the Court said, the doctrine of implied warranty will apply to the safeness of the bottle equally as well as it applies to the wholesomeness of the beverage contained in the bottle.

(*Johnson* v. *Louisiana Coca-Cola Bottling Co.*, Ct. App. La., Orleans, February 23, 1953, rehearing denied March 23, 1953, Regan, J., 63 So. 2d 459.)

Torts . . . Federal Tort Claims Act.

■ Prisoners confined in federal penal institutions may not avail themselves of the Federal Tort Claims Act to sue the United States for damages sustained by reason of the negligence of governmental employees charged with the duty of detaining and supervising the prisoners. This is the opinion of the United States District Court for the Western District of Virginia in a case of first impression.

Conceding that federal prisoners are not expressly exempted by the Act, the Court's ruling is based in part on analogy to *Feres* v. *U.S.*, 340 U.S. 135, where a cause of action under the Act was denied to members of the Armed Forces on active duty. The Court stated, moreover, that since the Act renders the United States liable "in the same manner and to the same extent as a private individual under like circumstances . . . " [28 U.S.C.A. §2674], it could not be construed as applicable because no private individual would find himself, in the language of the Act, "under like circumstances", *i.e.*, with a legal right to hold a person in penal servitude.

The Court also noted the statutory provisions for the administration of federal penal institutions and found that the intent of Congress was to establish a uniform prison system. This uniformity, the Court concluded, would be upset by the provision of the Act making liability depend upon "the law of the place where the act or omission occurred" [28 U.S.C.A. §1346(b)].

(*Sigmon* v. *U.S.*, U.S. D.C. W.D. Va., March 30, 1953, Barksdale, J.)

Taxation . . . retention of reversionary interest in trust.

■ In 1931 a settlor-decedent created a trust with his wife as beneficiary, the trust instrument providing that if the beneficiary did not exercise powers of appointment given her, the trust estate, upon her death, would go to those entitled to her estate under Pennsylvania's intestate descent law. Under that law the settlor-decedent would have been entitled to one third of his wife's estate. In 1943 the wife relinquished the powers of appointment.

Therefore on the settlor-decedent's death the Commissioner claimed that one third of the trust estate should be included in his gross estate under IRC §811 (c) (1)-(C) as a transfer intended to take

effect in possession or enjoyment at the decedent's death and as to which he had "retained a reversionary interest in the property, arising by the express terms of the instrument of transfer and not by operation of law. . . ."

The Court of Appeals for the Third Circuit, affirming the Tax Court, held that "express terms" meant just what it said, and that there were no "express terms" of reversion in the present instrument. The Court ruled, moreover, that the transfer was not intended to take effect in possession or enjoyment at or after the decedent's death. Consequently, the trust property was not includible in the settlor-decedent's gross estate for estate tax purposes.

(*Commissioner* v. *Estate of Marshall*, C.A. 3d, April 10, 1953, Kalodner, J.)

Taxation . . . effect of interlocutory divorce decree.

■ The Tax Court of the United States in two recent cases has considered the relationship of spouses during the period in which an interlocutory decree of divorce is in effect.

In one case, arising under Utah law, the wife obtained an interlocutory decree in August of 1949. Under state law the decree did not become final until six months later and such marital concomitants as inheritance, right to petition for letters of administration, etc., were preserved during the interim period. The Court held that therefore the wife and the taxpayer were entitled to file a joint return for the year 1949 under IRC §51(b).

(*Marriner S. Eccles*, U.S. Tax Ct., March 11, 1953, Hill, J., 19 T.C. No. 119.)

■ In another case, arising under Colorado law, the wife obtained an interlocutory decree in December of 1947. Here again under state law the decree did not become final for six months and the wife's marital rights were preserved during the interim. The Court, following the analogy of *Eccles*, ruled that temporary monthly support payments made by the husband during the six months' period were not taxable to the wife under IRC §22 (k).

(*Alice Humphreys Evans*, U.S. Tax Ct., March 20, 1953, Rice, J., 19 T.C. No. 126.)

Taxation . . . deductibility of lawyer's expenses in attending tax course.

■ A lawyer whose responsibilities in his firm included keeping abreast of current tax law has been allowed by the Court of Appeals for the Second Circuit to deduct expenses of attending a short course in federal taxation. The deductibility was predicated on IRC §23 (a)(1) (A) as an ordinary and necessary expense incurred in carrying on a trade or business, and the Court pointed out that therefore regulations issued under IRC §23(a) (2), which relates to nontrade and nonbusiness expenses, would not be applicable.

The Court also denied the applicability of Justice Cardozo's dictum in *Welch* v. *Helvering*, 290 U. S. 111, that the cost of acquiring learning is a personal expense. That observation, the Court declared, related to knowledge obtained for its own sake or for possible use in some future work, and did not foreclose an exception where "the information acquired was needed for use in a lawyer's established practice". In the instant case the Court found analogy in allowance of deductions to professional men for dues to professional societies and subscriptions to professional journals.

Neither could the expenditures be considered for the purpose of acquiring a capital asset, the Court observed, for the "rather evanescent character" of tax law knowledge "deprives it of the sort of permanency" that the capital asset concept embraces.

(*Coughlin* v. *Commissioner*, C.A. 2d, April 14, 1953, Chase, J.)

Torts . . . instruction that damage award not taxable.

■ It is proper for the trial court to instruct a jury and for defendant's counsel to remind the jury in argument that the amount of damages awarded in the verdict in a personal injury action is not subject to federal income tax. Illinois has become the second state to adopt this view, following the lead of Missouri in *Dempsey* v. *Thompson*, 251 S.W. 2d 42, where it was stated that since jurors, like most citizens, are "acutely sensitive to the impact of income taxes", they might add to the verdict to compensate for the defendant's supposed tax burden. In the instant case the Court said it saw no danger that its decision might open the way for instructions that the defendant would not reap the full amount of the verdict because of attorney's fees and other costs.

(*Hall* v. *Chicago & Northwestern Railway Co.*, App. Ct. Ill., 1st Dist., February 2, 1953, Friend, J., 110 N.E. 2d 654.)

Wills . . . when beneficiary guilty of manslaughter of testator.

■ In 1947 Connecticut by statute prohibited any person "finally adjudged guilty . . . of murder in the first or second degree" from inheriting or taking by will any part of the estate of the person killed. In the instant case a husband shot his wife. He was indicted for second degree murder but convicted of manslaughter. His wife's will left her entire estate to him.

Although it was not seriously contended that the statute barred the husband from taking under the will, since he was not convicted of murder in the first or second degree, the wife's next of kin and heirs at law urged that the statute had not stripped the courts of their common law authority to void the devise or to impose a constructive trust upon it on the ground that one should not be allowed to profit from his own wrong. The Supreme Court of Errors of Connecticut, however, rejected this theory and held that the statute was controlling. The Court found that in the absence of statutory provision the general rule is that one who murders his ancestor may inherit, except in cases of life insurance proceeds where contract law prevails. To bar the devise in the present case,

the Court said, would be to disregard and rewrite the law relating to revocation of wills.

(Bird v. *Plunkett et al.,* Sup. Ct. Er. Conn., February 17, 1953, Brown, C.J., 95 A. 2d 71.)

Workmen's Compensation . . . attorney's contingent fee contract.

■ The Supreme Court of Texas has held that in a workmen's compensation case it was reversible error to allow the injured party's attorney to inform the jury that the attorney had made a contract with his client under which the attorney would receive one third of the recovery. The Court said such action was "reasonably calculated . . . to influence the jury to make a larger award than it otherwise would have made".

In the instant case the injured party, while on the stand, removed his shoes and socks and demonstrated to the jury that he could not depress his foot below a certain position. Having done this, the Court declared, the foot was in effect in evidence and it was therefore error to deny to the insurer's doctor the right to manipulate the foot for the purpose of showing that it could be moved up and down from the ankle joint.

(Texas Employers Insurance Association v. *Hatton,* Sup. Ct. Texas, February 11, 1953, rehearing denied March 25, 1953, Culver, J., 255 S.W. 2d 848.)

Department of Legislation

Charles B. Nutting, Editor-in-Charge

■ The teaching of legislation as a separate subject in the law school curriculum has received increasing acceptance but still encounters occasional criticism. On the basis of his experience as a teacher and draftsman, Professor Elliott points out the reasons for formal instruction in the field.

Legislation as a Law School Course

by Shelden D. Elliott, Professor of Law, New York University

■ The past twenty years have seen the subject of legislation acquire increasing acceptance in law school curricula. Like any comparative newcomer, it has had to buck tradition and, at times, the skepticism-*cum*-reluctance of those who doubt its entitlement to recognition. "Besides," say the diehards, "it is not a bar examination subject!"—as though that were the ultimate criterion of academic respectability.

At the risk of belaboring the (to me) obvious, let me suggest just a few reasons as to why we have modern law school courses on the subject. Let's take, as a starting point, the practical day-to-day business of the lawyer. In law school he was trained, and ably trained, in the case method. Casebooks and law reports, key numbers and Shepard's Citations, annotations and digests, are to him familiar tools. Yet, when he encounters a new problem in his practice, to what does he turn first? To the cases? Rarely. He is much more apt to turn to the statutes—revised, compiled or codified—and busy himself with finding the legislative law in point. If it isn't a statute on which the issue hinges or the answer depends, the chances are that it is an administrative regulation or an ordinance.

"But", say the traditionalists, "students learn all they need to know about statutes in their respective subject courses. Modern casebooks are no longer just compilations of cases. They are 'cases and materials', including statutory." Granted, but if that's so, why not give students the benefit of at least a grounding in the legislative process common to all statutes, rather than a smattering of the end product? And if the same principles of interpretation, the same types of intrinsic and extrinsic sources of meaning, the same truths and fictions of "legislative intent", pertain to statutes generally, why not treat them generically, rather than on a casual subject-by-subject basis?

From the standpoint of adequate protection of a client's interests, the lawyer cannot afford to remain oblivious to the legislative process in action. The Congress or a state legislature in a single session can produce more law that impinges on or vitally affects more people than does the average output of a supreme court in a decade. A motor vehicle law, an income tax amendment, a rent control statute, or a Selective Service Act, has general and far-reaching impact. But even less publicized or scarcely noticed legislative action may bear upon substantial groups of citizens other than those primarily interested in supporting or opposing it. The attorney's duty to protect or assert his client's cause requires parliamentary as well as forensic vigilance.

Despite occasional efforts in the direction of improvement, legislative procedure remains cumbersome, archaic and often frustratingly inefficient. Thousands upon thousands of bills are poured into legislative hoppers each biennium. In the process that follows, overworked legislators striving against odds of volume and time, are faced with pressures and demands that often make compliance with constitutional formalities of procedure an inevitable fiction. To represent his client, then, and to protect his interests in the legislative mill, the lawyer must know its workings both in theory and in reality.

He must also know the requirements of and the limitations on lobbying—when and where to register as a lobbyist or legislative advocate, what to disclose as to his

relationship and the interests he represents. He must know the procedure, jurisdiction and functions of legislative committees. If, as recent developments indicate, the procedures of legislative investigating committees are being brought somewhat more nearly into accord with fundamental concepts of due process, the lawyer will have an increasing role in the representation of witnesses before such committees.

A knowledge of legislative procedure is, however, but an incidental facet of the lawyer's equipment in the field of statutory law. Dealing for the most part with statutes which are the end results of such procedure, he needs to know more than traditional law school courses customarily give him about the constitutional validity and vulnerability of legislation. The strictures of state constitutions on the form and subject-content of legislation reach well beyond the hallowed domain of "constitutional law" in the orthodox sense. Thus, prohibitions against "local and special acts", limitations on appropriations or on "gifts of public money", mandatory requirements that each act embrace but one subject which shall be expressed in its title, prescriptions that revised or amended laws shall be re-enacted at length, specifications as to the exact wording of enacting clauses, are all constitutional provisions common to most states. They are not generally included or touched upon in law school courses in constitutional law. Yet, as grounds of challenge to the validity of state legislation, they are as productive of litigation as, for example, the commerce clause or the Fourteenth Amendment in the federal field. And a statute invalidated because of noncompliance with such formal requirements is just as void as if it contravened the more fundamental and better-known organic guarantees.

Perhaps the broadest area of day-to-day legal problems in the legislative field is that of statutory interpretation. As legislation in the form of statutes, ordinances and administrative regulations proliferates in overwhelming volume, the necessity of interpretation and application to individual situations correspondingly increases. And since interpretation is essentialy a legal question it is essentially a task of the lawyer. He needs to know not only the rules and canons of construction but also the extent to which other parts of the statutory instrument, as well as outside sources, may be resorted to in ascertaining its meaning. He should be aware of principles incident to interpretation of related statutes and of uniform laws. To persuade the courts or other official authorities to adopt an interpretation consistent with the lawyer's version of legislative meaning is an essential technique of advocacy.

While the art of drafting legislation is becoming more and more a specialized skill for legislative drafting bureaus and agencies, the general practitioner has occasion to use it. He may be called upon to draft an entire statute or merely to prepare a minor proposed amendment to an existing law. It is an art which calls for competence of as careful an order as that required for other legal documents of the highest importance to his client's interests and protection. Not only the words to be used, but the organization and framework of the draft, as well as the sanctions, if any, by which it is to be carried into effect, must be considered and chosen with care. Certainly it is not amiss that law students should be afforded some conversance with these skills to the same degree as in other areas of draftsmanship.

These then are some of the reasons why a law school curriculum today includes a course on the subject of legislation. In some law schools it is regarded as sufficiently basic to be required in the first year of law study. Whether so given as a separate subject or merely as a component of a general introductory or orientation course, there is merit in making law students early aware of the part that statutes play in the over-all complex of the law. Otherwise they tend to think of judicial decisions as the be-all and end-all of legal sources. I have heard a law teacher aptly suggest that law students, if not introduced to legislation reasonably early in their training, tend to become "case-hardened". That tendency has left its mark on the legal profession generally. A few generations ago, and except for an occasional Jeremy Bentham or a David Dudley Field, lawyers viewed statutory law with a distrust and suspicion bred of unfamiliarity.

Engulfed in the rising tide of legislative enactments, society generally has come to accept their inevitability. Law schools, in the process of adjusting their curricula to the requirements and needs of the profession, have similarly come to this view. Whether the subject of legislation is given in the first law school year—or the second, or the third—I hold confidently to the view that it is here to stay.

Tax Notes

■ Prepared by Committee on Publications, Section of Taxation, Harry K. Mansfield, Chairman.

Employees' Annuities Under Nonqualified Plans

■ The problem of providing retirement compensation for employees cannot always be met through plans that qualify under Section 165(a) of the Internal Revenue Code. Use of nonqualified plans is frequently necessary. The general requirements and tax consequences of Section 165 are well known among lawyers, but the tax consequences of arrangements that do not qualify under its provisions are less defined and are not generally appreciated. A harsh result, which was obviously unforeseen by the taxpayer, turned on an interpretation of statutory language dealing with employes' annuities in the recent case of *Morse* v. *Comm'r*, 202 F. 2d 69 (2d Cir. 1953), *aff'g* 17 T. C. 1244.

In this case, Elliott C. Morse was taxed in 1943, the year he retired, on the full value of an anuity contract on his life bought by his employer in 1941. He contended that he should be taxed only on the amount actually distributed to him during the year.

This decision brings into focus the provisions of the statutes and regulations dealing with forfeitable and nonforfeitable employees' annuities purchased under nonqualified plans. It points up sharply the lack of realism in making the element of forfeitability in these cases the sole statutory criterion to determine the principal tax effect.

In most instances Sections 22 (b) (2) (B), 23(p) (1) (D) and 165 (c) place the tax burden on the employer or on the employee, depending on the forfeitability or nonforfeitability of the employee's rights at the time of the employer's contribution. If his rights are nonforfeitable at that time, the employee is taxed on the contribution in the year when it is made, but the employer has a deduction in that year. If his rights are forfeitable, however, the employee is not taxed in the year of contribution but the employer has no deduction at all, neither in the year of contribution nor in a later year. Special rules applicable to corporations exempt under Section 101 (6) are not considered in this discussion.

More specifically, Section 22 (b) (2)(B) provides, in effect, that if the employee's rights under the annuity contract are nonforfeitable, the employer's contribution, if made at or after the time the rights became nonforfeitable, shall be taxed to the employee in the year when contributed. This provision has been construed in Treas. Reg. 111, Sec. 29.22 (b)(2)-5, to mean that if the employee's rights in such a case were forfeitable when the contribution was made, the amount of the contribution would not be taxable to the employee even though his rights became nonforfeitable later; he would only be taxed on the annuity payments when they were actually distributed or made available to him. The precise meaning of this regulation has been the subject of some disagreement and conjecture, but it would appear that if the employee's rights were forfeitable when the contribution was made he would not be taxable on the contribution if his rights were made nonforfeitable in a later year, even though this were done prior to his retirement.

In the *Morse* case, the employer, the Chrysler Corporation, in 1941 bought an annuity on Mr. Morse's life at the time he was 70 years old; he was still working with the company although ineligible to participate in the qualified plan which was set up in the same year. Application for the annuity had been made by the company, as purchaser, and by Morse, as the annuitant. The employer retained all rights in the policy and received and retained monthly cash payments during 1941 and 1942. Then, in 1943, when Morse retired, the employer executed a change-of-beneficiary form and assigned to Morse all of its rights in the contract, but without giving him the power to anticipate the cash surrender value.

When the Bureau undertook to include in his taxable income for the year 1943 the full cash value of the policy, Morse objected on the ground that Section 22 (b) (2) (B) excludes from employees' gross income all items with respect to employees' annuities except those specifically included; that the applicable sentence of the section includes only the amounts contributed by the employer at or after the time the rights became nonforfeitable and in the year when contributed; and that in his case the employer's contribution was made in 1941—two years before the rights became nonforfeitable—and therefore could not be taxed to the employee.

The Tax Court held, nevertheless, that the section did not apply because petitioner had no rights at all, forfeitable or nonforfeitable, in the contract prior to 1943; therefore, the payment by the company in 1941 did not constitute a contribution within the meaning of the statute. The Court concluded on this line of reasoning that "harsh as this result seems" the petitioner was taxable on the full value of the annuity in 1943. The conclusion was reached under the line of authority applicable before Section 22 (b)(2) (B) was enacted in 1942. See *Renton K. Brodie*, 1 T.C. 275. The value of the contract was held to be the cost of the premi-

um in 1941 less the subsequent annuity payments received by the company, a net amount of $33,895.25.

There were five dissenting judges in the Tax Court. Judge Arundell expressed the thought that the majority opinion was contrary to the spirit of the legislation dealing with the taxation of employees' annuities. He said that there were no contributions towards the purchase of the contract after the petitioner's rights became nonforfeitable, and therefore that nothing should be included in this income on account of the contribution. Judge Turner appeared to disagree with the old line of authority and to feel that a contrary result in the *Morse* case should have been reached even without Section 22 (b) (2)(B). He said, "I am still at a loss to know by what alchemy such prospective enrichment was transmuted into a present realization of income, it being specifically provided that neither the contract nor any benefits accruing thereunder could be transferred, commuted, anticipated or in any way subjected to petitioner's debts. The petitioner was full of hopes and prospects. He was, no doubt, sated with great expectations. But he had received nothing which presently, he could sell, trade, wear, use, eat or drink. 'Water, water, every where, nor any drop to drink.' "

The Court of Appeals, in a short opinion by Judge Frank, stated that Section 22(b)(2)(B) did not apply because it relates exclusively to a situation in which the employee obtains enforceable rights in the annuity at the time when the employer procures the annuity; and that, since Morse had no rights before 1943, this was not an instance where an annuity which was originally forfeitable when obtained became nonforfeitable in a later year. The Court also held in the alternative that if Section 22 (b) (2) (B) could be assumed to govern this situation, then the contribution was not made within the meaning of the statute until 1943; thus, the contribution was made at the time the contract became nonforfeitable and, therefore, the employee was taxable.

Although the Court of Appeals indicated that its decision was based on alternative grounds, these appear to be differently worded statements of the rationale which governed the decisions in both courts, *i.e.*, that a contribution within the meaning of Section 22 (b)(2) (B) could not have been made by the employer before the employee obtained some kind of rights, forfeitable or nonforfeitable.

It would be difficult to reach a different conclusion concerning the effect of Section 22(b) (2) (B) under the particular facts of the *Morse* case. The harsh result probably could have been avoided only if the courts held that the section did not govern the case and refused to follow the controlling principles applicable before its enactment, as set out in *Renton K. Brodie, supra,* a course that was virtually suggested by Judge Turner.

The basic inequity in the present law, at least the basic factor which will prevent a fair and realistic tax result in many cases, lies in the purpose to tax employees in some cases on the value of annuities bought for them by their employers, even though the actual income can only be realized at a future time. The somewhat doctrinaire view that an annuity has a present value which must be included in the employee's income if his rights are nonforfeitable, doubtless is implicit in the present statute, but it might well be reexamined by Congress. The quoted comments of Judge Turner are pertinent to that view and emphasize the practical incongruities to which it can lead in application.

The interpretation of the terms "forfeitable", "nonforfeitable" and "employer's contribution" or "contributed by the employer", contained in the statute and regulations, is obviously a fruitful source of misunderstanding and litigation. The suggestion has been made that these ambiguities might be removed by giving to the parties in each nonqualified arrangement involving nonforfeitable rights an election to determine whether the tax burden shall be borne by the employer through elimination of the deduction, or by the employee through inclusion of the value of the annuity in his income. The language of Treas. Reg. 111, Section 29.22(b) (2)-5 and the implications of the *Morse* case indicate that such an election now exists as a practical matter, since presumably a contribution may be made with reference to a contract involving rights initially forfeitable which could be changed the following year to nonforfeitable rights without causing the value of the annuity to be included in the employee's income. If so, the creation of such an election would not involve government policy with respect to revenue, but would only clarify and streamline an existing procedure.

Contributed by committee member Houstin Shockey

Activities of Sections and Committees

SECTION OF ADMINISTRATIVE LAW

■ Plans are under way to stage a demonstration on pretrial in an administrative hearing. This pretrial show will take place at the meeting of the Section of Administrative Law in Boston, which commences at 2 P.M., Monday afternoon, August 24, at the Kenmore Hotel. Dean E. Blythe Stason of the University of Michigan Law School, a member of our Council, is in charge of this educational venture. Pretrial demonstrations of the Section of Judicial Administration have been extremely popular and successful, and Dean Stason hopes that our first experiment will be of utility to members of the Bar attending.

Present thinking on the matter is that we shall first have a very brief discussion of the present state of pretrial in the various agencies which have undertaken it or are making immediate plans to institute it, and then take the Federal Communications Commission for our study. That agency has just made pretrial in television proceedings (where there is a contest between applicants) a compulsory matter and members of the Federal Communications Bar Association have heartily endorsed Dean Stason's idea and promised the utmost co-operation.

Dean Stason envisions putting in the hands of the audience a statement of the rules and procedures of the Commission, and perhaps a summary of the applications for a TV license, and of the issues as stated by the Commission. That will be followed by the pretrial demonstration itself, for which a cast of characters is being drawn up.

It is expected that a hearing examiner who ordinarily hears such matters will preside, and attorneys who are skilled in such proceedings will take the part of the respective applicants' and Commission counsel. It may be that a radio engineer and accountant will also be enlisted for the project. It is expected that the demonstration will show how issues can be discussed and clarified, how proofs can be simplified by stipulation or other agreements with regard to preparation of exhibits and how in other respects the length and complexity of the hearing itself can be reduced.

It is expected that a fully informative and helpful program with respect to pretrial procedures in administrative hearings will be the result of these preparations.

SECTION OF ANTITRUST LAW

■ The program of the Section for the Annual Meeting has been formulated. A symposium will be held to supply the antitrust practitioner with up-to-date definitions for each of the key words and phrases of the antitrust laws. These words have been given such new meanings by the courts that the old definitions are practically obsolete. The morning of August 26 will be devoted to the Sherman Act; the morning of August 27 to the Clayton Act. There will be four speakers at each morning session.

In addition, the Section plans to hold a joint dinner with the Mineral Law Section at the Somerset Hotel on Wednesday, August 26, 1953, at 7:00 P.M.

COMMITTEE ON PUBLIC RELATIONS

■ The rapidly growing trend toward television in bar association public relations is one of the most encouraging developments of recent months.

During the early stages of television its use was necessarily limited to major cities having TV outlets. It still is limited, to some extent, but the number of stations is increasing and so is the interest of state and local bar association public relations committees in the tremendous possibilities of this medium to make the public better acquainted with lawyers and what they do.

Now is the time to make definite plans for taking advantage of TV opportunities. This was made clear in an informative report made by Cecil E. Burney, of Corpus Christi, past president of the State Bar of Texas, before the mid-year meeting of the National Conference of Bar Presidents in Chicago.

Mr. Burney pointed out that 1,200 applications for new television outlets are pending before the Federal Communications Commission. Many of these are for the new ultra high frequency channels. Every applicant must agree, he said, to furnish at least 30 per cent of free telecasting time to public service type programs. The stations are looking for good programs in that category. Mr. Burney put it this way:

"So immediately we have an opportunity to go to these applicants and say to them: 'Look, you are asking for a television station. We will help you. We will put our Legal Aid Society, or Lawyer Referral, or our Bar Association on your facilities and we will give you a letter or appear as a witness at your hearing and tell the FCC about that.' They are tickled to death to have someone come in as a volunteer to help them get that license, because that means a whole lot."

Mr. Burney added that the federal TV licenses are on a yearly basis, and renewals depend in part upon the station's making good on its public service promises. Consequently, the station would have an interest in helping the bar associations, or its other "public service" groups, to produce good shows. He concluded:

"So, the time is ripe for bar associations to get on the air and on the ground floor with television and then you can't be thrown off at the whim of some sponsor."

Here is an opportunity for every state and local bar association public relations committee, in cities where applications for TV channels are pending or have been recently granted, to make some solid plans for utilizing this medium. At least ten state bar associations and nine major city associations have presented, or are now presenting, television programs of various kinds—interviews, panel discussions, dramatizations and the like. Generally speaking, the results have been good.

In line with the new trend, the Colorado Bar Association is making plans to enter the field with a series of thirteen TV films dealing with the profession, which will be of general interest and available for showing elsewhere. The series will be professionally produced and will be screened by lawyers. A pilot picture will be ready by the latter part of this year. It is planned to send this picture for viewing to other interested associations. If sufficient interest is shown in the pilot film, the entire series will be produced on a cost-sharing basis with other bar associations. More information will be forthcoming later, but inquiries are invited by William Hedges Robinson, Jr., Equitable Building, Denver, Colorado, Chairman of the Colorado Bar Association Committee.

OUR YOUNGER LAWYERS

C. Baxter Jones, Jr., Secretary and Editor-in-Charge, Atlanta, Georgia

■ This article is the first of several dealing with the history and achievements of various junior bar sections throughout the country which have consistently stood high in the annual judging of applications for awards of merit. Each of these articles is being submitted by a key junior bar official of the state in question, at the request of the Secretary of the Junior Bar Conference.

Highlights of the Work of the Michigan Junior Bar Section

by Rosemary Scott
Member of the National Junior Bar Conference Council

■ Highlights of the work of the Michigan Junior Bar Section in the twelve years since its organization center upon its increasing service to the Bar and the public and upon greater participation by young Michigan lawyers in the work of the organized Bar.

Founded in 1940-1, the Michigan organization of younger lawyers has had the generous support of the Commissioners of the State Bar, their executive secretary, Milton E. Bachmann, and their public relations counsel, Hugh Brenneman, who attend the monthly meetings of the Section's Council. The president of the State Bar receives all communications of the Section and attends its meetings when he can. All proposed projects of the Junior Bar Section must be submitted to the State Bar president for his approval; to date that approval has always been given.

At the beginning of the organization year each fall, the Section submits a budget to the Commissioners of the State Bar for projects to be undertaken. Budgets always have been approved as submitted and thus the Section has been able to plan and carry out its projects from the beginning of each year. The budgets cover such items as the cost of preparing radio scripts and transcriptions, printing public relations and other materials for lawyers and law students. The cost of meetings, of sending delegates to conventions, and of printing, postage and stationery are not separately budgeted for the Section.

The Section is organized on a state-wide basis. It is headed by a Council composed of twelve persons, six of whom are elected annually for two-year terms. From its own membership the Council chooses a Chairman, Vice Chairman and Secretary. This procedure for election of officers is new. A recent change in the by-laws gives the Section the right to choose its own leaders. Previously, names of two nominees were submitted to the incoming president of the State Bar who selected the chairman, while the other officers were elected by members of the Section.

In addition to the twelve-man Council, the Section chairman appoints state committee chairmen to head each project undertaken by the Council. These chairmen also serve as committee members of the Junior Bar Conference. At present these number twelve.

The state is subdivided into eleven regions each containing four to six contiguous counties with a regional chairman and committee chairmen, duplicating those appointed on a state-wide basis. These regions may be subdivided further, especially in the northern, sparsely settled regions of the state.

The Council, state committee chairmen, regional chairmen and, on a rotating basis, regional committee chairmen meet monthly for a luncheon or dinner meeting sponsored by the State Bar. Local groups also meet on a monthly basis.

This organization has more than 150 committees and holds more than

seventy-five meetings of young lawyers in the state each year. These meetings provide activity, interest and sociability for lawyers who have recently entered practice.

The projects of the Section have been its lifeblood. The aim has been to select those which will be of most practical benefit to the public and to lawyers.

Of particular importance in Michigan has been the development of legal aid and lawyer referral plans. Television, radio programs and speakers' bureaus are used to inform the public of these services. It has been gratifying to note the increased use of these services when well publicized by the Bar. In every case the Michigan Junior Bar has co-operated with the Legal Aid and Lawyer Reference Committee of the State Bar of Michigan, and Junior Bar members have served on local bar committees dealing with these services. The result has been the formation of legal aid bureaus and lawyer-referral plans in new areas each year and an increase in the use of established offices. Young lawyers have found that there has been an increased demand for legal services through the use of legal aid and lawyer referral services.

Likewise, the members of the Council have served as members of the Michigan State Bar Public Relations Committee. In this way they have participated in the plans for an over-all program to integrate the programs sponsored by the Section. In many local areas, the chairman of the local bar public relations committee or members of the local committee are young lawyers, which means that there is close co-ordination in those areas.

Another facet of public service is the program developed for the high schools and colleges of the state. Mock trials are presented or directed by lawyers. Lectures on court organization are given, frequently preceding tours of local courts. Young lawyers have been active participants in career-day programs for both high schools and colleges, particularly in the Detroit area.

A current project of the Section is the printing of handbooks for drivers which will contain driving rules and instructions on what to do in case of an accident. These handbooks are being published with the assistance of insurance companies and associations of car dealers in Michigan.

Bulking large in the activity of the Michigan Junior Bar are its programs for the assistance of law students. For the past five years a survey of all law offices, banks, trust companies and insurance companies has been made for the purpose of listing openings for summer law clerks and permanent placement. Panel discussions on practice and other kinds of employment and on practice before various courts and agencies have been given regularly for the last ten years at the four Michigan law schools located in Detroit and Ann Arbor. *Prospectus,* a four-page magazine for law students is published throughout the school year by the Section. It contains information on bar activities of interest to students, articles on practice and job placement. It is distributed free of charge to all law students in Michigan.

For the last two years, in co-operation with The Association of the Bar of the City of New York, the Section has sponsored moot court competitions for the law schools in the Sixth Circuit. This again has brought law students into contact with lawyers.

At admission ceremonies, representatives of the Section welcome newly admitted lawyers and hold special social events in their honor.

To continue the legal education of its members the Michigan Junior Bar Section has co-operated with legal institutes sponsored by the State Bar and law schools and has conducted special institutes of interest to lawyers beginning practice.

Handbooks of federal and administrative practice and practice before all state courts have been published giving helpful, practical hints not available elsewhere.

Perhaps unique in Michigan is the Junior Bar Wives, an association composed of the wives of the lawyers eligible for membership in the Section. This group sponsors social events to welcome new lawyers and their wives to the community, arranges parties and picnics for lawyers and assists with the hospitality for conventions of the State Bar.

Cutting across and through all the work of the Michigan Junior Bar is co-operation with the American Bar Association's Junior Bar Conference. Since its organization, the Michigan Section has been represented at all the annual and mid-winter meetings of the National Conference. It has endeavored to co-operate fully with the activities and membership solicitation of the American Bar Association.

The Michigan Junior Bar has received five Awards of Merit from the National Junior Bar Conference in the last six years. Such recognition is a challenge to extend and intensify the work of the Section so that the activities of young lawyers in Michigan may be more useful to the public, the State Bar of Michigan and the American Bar Association.

Views of Our Readers

■ Members of our Association are invited to submit short communications expressing their opinions, or giving information, as to any matter appearing in the *Journal* or otherwise within the province of our Association. Statements which do not exceed 300 words will be most suitable. The Board of Editors reserves the selection of communications which it will publish and may reject because of length. The Board is not responsible for matters stated or views expressed in any communication.

A Dissenter on Judicial Salaries

■ In Morris B. Mitchell's article on "The Judicial Salary Crisis" in your March, 1953, issue he compares the buying power of the "take home" pay of federal district court judges in 1939 and 1951. He notes that up to 1939 federal salaries were not subject to federal income tax. He also notes that the cost of living has gone up 92 per cent from 1939 to 1952. What he does not say was that the salaries of federal district court judges were raised in 1946, from $10,000 to $15,000.

A judge is certainly worthy of his hire. So is the man who keeps the judge's office clean. The trouble is that there are no standards available today by which to determine the proper compensation of any workman.

Mr. Mitchell, however, says or implies that the present salary of a federal judge leaves nothing for emergencies or savings after paying necessary living expenses, nor permits a savings or insurance program adequate to protect dependents of a judge in the event of his death.

The fact is, however, that most married men with families who have a salary or other business income of $15,000 do manage to live decently, provide for the necessities and quite a few of the luxuries for themselves and their families, send their children to college, give a fair share to church and charity, and still save substantial sums by way of insurance and otherwise for the support of their dependents. And most of these persons earning $15,000 a year do not have the privilege of retiring at the age of 70, sure of a $15,000 income for the rest of their lives, as is the case of federal district court judges.

As a matter of fact as shown by the article on "The Economics of the Legal Profession" appearing in the same issue of the JOURNAL, in 1948 the mean net income of all lawyers in the country reached $8315 and the median net income was $6336. It is hard to believe that the average lawyer with the income referred to was not able to do what was right by his wife and family. And it is a far cry from that amount to $15,000.

Neither do I follow Mr. Mitchell in his belief that lawyers whose earnings are no larger than the present salaries of federal district court judges, are to be regarded as necessarily "unsuccessful in practice". The amount of fees received is only one factor in determining whether a lawyer is successful in practice, and so fitted for judicial office. Other factors are his reputation for integrity, his legal ability, sense of fairness, and public spirit. There are many lawyers who qualify in these respects who would rejoice to accept federal judicial office on the present basis of compensation.

JAMES M. ROSENTHAL

Pittsfield, Massachusetts

Are We Overzealous?

■ It's the same old story: one extreme leads to another. Communism having deified the Proletariat, Democracy retorts with the deification of the Individual. Eisenhower, in his inaugural address, proclaims our faith: "the abiding creed of our fathers . . . in the deathless dignity of man, governed by eternal moral and natural laws" which "defines our full view of life". To the same effect is Dillard S. Gardner's article in the January JOURNAL on "The Worth of the Individual", which serves as a timely and scholarly briefing of the President's sweeping thesis, Mr. Gardner hails the individual "as the ultimate measure of things"—"the fundamental value of our age . . . which has not been watered down, or destroyed, by a corrosive sophistication insisting that all truths are relative and that there are no absolutes."

All this overzealousness in our cause impresses me as the usual bigotry born of war. The role of the individual in law or political science cannot be so glibly isolated. We are dealing with the ageless task of scholars: conceiving the most perfect balance between social order maintained through law and the freedom seeking instinct of man. Following the concept developed by Lord Acton, we are confronted with dual or interlocking principles: the Worth of Man and the Unity of Society. Such was the able analysis of Secretary of State Acheson in his discussion of this subject before the American Society of International Law on April 24, 1952. But for the most sobering commentary, it is well to turn to the recent words of an eminent theologian, Reinhold Niebuhr, —"The community is as primordial as the individual. Both Nazi and Communist forms of collectivism are inevitable reactions to the individualism of the bourgeois age. They are just as much in error as the individualism; but hardly more so. . . . The individual is not an end in himself, and cannot live within himself. Love is the law of his existence."

STANLEY P. SMITH

Oakland, Maryland

Says Coke Is Overpraised

■ The JOURNAL, in its February issue for 1953, carries a splendid article by President Robert G. Storey, entitled "Law in the Atomic Age".

It is unfortunate that Mr. Storey singles out two English lawyers—Bacon and Coke—as symbolizing the modern era and as worthy of praise for having contributed to the growth of the rights of men and present-day democracy. It is difficult to see why either of them should be deemed praiseworthy.

Bacon was a disgrace not only as a lawyer but as a judge. Any American lawyer who has read the "State Trials" or the splendid biography by Hastings Lyon and Herman Block, entitled *Edward Coke, Oracle of the Law,* would certainly hestitate to call Coke a "pre-eminent lawyer". The "State Trials" show him as a prosecuting lawyer who was vindictive, small, petty, and mean and thoroughly lacking any of the qualities that an American lawyer deems necessary to be pre-eminent. The history of Coke's life shows him, in general, as subservient to the Crown and as independent in only a few instances when his subserviency had not advanced the cause of Coke.

The plain fact is that the only English lawyer who as a lawyer, jurist, statesman, citizen and humanist is worthy of being the model for a lawyer in America, is Thomas More.

Lawyers generally have viewed, as an isolated instance, the attitude of Coke towards Sir Walter Raleigh when Raleigh was convicted of treason. However, in a book recently written by William McElwee and published by Faber and Faber of London entitled, *The Murder of Sir Thomas Overbury,* the unfair, prejudicial, immoral and illegal actions of Coke in a criminal case are strikingly brought out. For some unknown reason, Coke is the recipient of much unmerited praise. Anyone who makes a study of the State Trials or of the life of Coke, will soon come to the realization that nothing in his life as a lawyer, citizen, jurist, or member of Parliament, is worthy of emulation or imitation by an American lawyer who believes in justice and democracy.

Z. L. BEGIN

Marshall, Minnesota

Karl Marx and Tax Reduction

■ I have just read the article in the March issue of the JOURNAL by Robert B. Dresser, entitled "The Reed-Dirksen Amendment: Developments in the 83d Congress", and desire to enter an exception to the statement therein that "Opposition to the revised amendment can be explained only by an adherence to the taxation philosophy of Karl Marx" (Page 207, second column).

"The power to tax is the power to destroy." It may be that further limitations on the exercise of that power by the Congress are necessary. As to that, I have not made up my mind. I can assure you that it will be made up without recourse to the "philosophy of Karl Marx".

It is time to call a halt to the practice of insinuating that any who differ with a stated viewpoint is a subversive or communist traitor. An individual of the professional standing of Mr. Dresser and a publication of the caliber of the AMERICAN BAR ASSOCIATION JOURNAL should not countenance such tactics.

LUCY SOMERVILLE HOWORTH

Washington, D. C.

Mr. Coil and Mr. Gardner on Individualism

■ It was interesting to note in the January, 1953, issue the different conclusions reached by Henry W. Coil in his article "The Background of the Constitution" and Dillard S. Gardner on "The Worth of an Individual".

The former quotes:

> Green, in his *Short History of the English People* speaking of the Engel-Men or Angles, even before their advent into the British Isles, says, laconically but significantly: "The basis of their society was the free man."

However, the latter says:

> The concept of individualism is a modern one, although contributing ideas go back to the Old Testament.

and later:

> One of the factors required to develop it was "The enhancement of the idea of the supreme worth of the individual, which came from Christianity and blazed up again at the Reformation."

Moreover, Mr. Coil disagrees with Mr. Gardner regarding the origin of laws governing individuals as follows:

> The making of the English law was not confined to royal charters or to constitutional or fundamental principles, but the making of private law, governing the multitudinous personal relations, went on among the people all the while. Out of the sands of Mesopotamia, there has been discovered the Code of Hammurabi, possibly 5000 years old; Athens had her Solon; the Corpus Juris and the Code of Justinian were the law of the Roman Empire; and the Code Napoleon furnishes the law of France and of most European nations; but there never was such a Code in England.

It is my belief that Mr. Coil has a sounder background for his conclusions than Mr. Gardner.

HERBERT JOHNSON

Atlanta, Georgia

BAR ACTIVITIES

Paul B. DeWitt · Editor-in-Charge

■ Juan Bautista de Lavalle, Ambassador from Peru to the Organization of American States, was recently tendered a testimonial dinner by the Inter-American Bar Association and the District of Columbia Bar Association at Washington, D.C. Dr. Bautista was introduced by W. Frederick Weigester, Chairman of the Inter-American Bar Association, and Preston W. King, President of the Bar Association of the District of Columbia. The testimonial address was given by Judge George D. Neilson of the Municipal Court for the District of Columbia.

■ The Ohio State Bar Association approved a resolution of its Committee on Unauthorized Practice of Law, disapproving the preparing and filing of petitions for adoption by County Welfare Boards as being the unlawful practice of law. By the resolution the Association recommended that this practice be prevented by probate judges and unauthorized practice committees of local bar associations, and that none but practicing attorneys be allowed to appear in open court as agent for adopting parents in connection with such proceedings.

■ With the aid of a pretrial procedure, one of the most effective features of which is a twice-a-day impromptu lecture on the need for responsibility and tolerance in married life, Judge Arthur H. Day of the Cleveland, Ohio, Court of Common Pleas, has reduced the backlog of divorce cases in the Court from thirty months to a little more than ten months. Assisted by divorce assignment commissioners John Lavelle and Herman Sacks, Judge Day's pretrial procedure, which operates very effectively where children are involved, has enabled dismissal of 1949 divorce cases in about nine weeks, more than half of which cases ended in reconciliations. Normally only two contested cases are assigned to the Court and heard each day. However, from January to March, 1953, the Court has handled 600 noncontested cases and 342 cases have been tried or settled, 679 noncontested cases dismissed and 938 contested cases dropped. Inasmuch as the divorce rate in the county where Judge Day's plan is in operation is one for every 2.8 marriages, the plan warrants careful study by other communities.

■ Lawyers' Week, a series of lectures and social gatherings was recently held at the Southwestern Legal Foundation by the Foundation and the Southern Methodist University School of Law, in co-operation with the state bar associations of Texas, New Mexico, Arkansas, Oklahoma and Louisiana and the Dallas Bar Association. Those attending were welcomed by Robert G. Storey, President of the Southwestern Legal Foundation and the American Bar Association, J. Glenn Turner, President of the State Bar Association of Texas, and Ralph Baker, President of the Dallas Bar Association. Features of the conference were the institutes on the trial of a land suit and on a legal study of the Texas Business Corporation Act. The conference included lectures by Judge Robert N. Wilkin, United States District Judge, Retired, Cleveland; Thomas E. Davitt, S.J., John S. Marshall, and Arthur L. Harding.

■ James J. Ward, Jr., Elizabeth, New Jersey, has been appointed Fellow of The Association of the Bar of the City of New York, it was announced by Bethuel M. Webster, President of the Association. Mr. Ward attended Columbia College and was Co-Captain of the Columbia University football team. He is a member of the Blue Key Society of Columbia, the Senior Society of Nacoms, and winner of the Charles M. Rolker, Jr., prize. While in law school, Mr. Ward was freshman end coach, Chairman of the Student

JAMES J. WARD, JR.

Placement Committee, and a member of Phi Delta Phi. He has served as Assistant to the Director of Admissions, Columbia University, and as Undergraduate Dormitory Counsellor.

The Fellowship to which Mr. Ward has been appointed is granted annually by the Association to an outstanding law school graduate. The holder of the Fellowship spends a year with the Association working on various projects and reports developed by the Association's Committees.

■ The Harlem (New York) Lawyers Association held its annual meeting in February. Miss Cora T. Walker was elected President of the Association, succeeding Joseph J. Allen. Presiding Justice David W. Peck of the Appellate Division of the State Supreme Court and Bethuel M. Webster, President of The Association of the Bar of the City of New York, were the principal speakers.

■ In May John J. Parker, Chief Judge of the United States Court of Appeals for the Fourth Circuit, delivered the Twelfth Annual Benjamin N. Cardozo Lecture before The Association of the Bar of the City of New York. Judge Parker's subject was "The American Constitution sociation on the topic, "As a New-

and World Order Based on Law".

In April Attorney General Herbert Brownell, Jr., spoke to the Association's Section of Judicial Administration on "Newcomer Sees the Department of Justice". Mr. Brownell has been a member of the Association since 1931, and was serving on its Committee on Law Reform when appointed Attorney General.

"Legal Log Jam in Chicago"

■ *The November 10 issue of* Life *devoted eight full pages to a story entitled "Legal Log Jam in Chicago". The story dealt in some detail with the tremendous backlog of cases in the Chicago courts. When the article appeared, Judge Ira W. Jayne, Chairman of the Association's Section of Judicial Administration, wrote the following letter to the editors of* Life.

■ As Chairman of the Section of Judicial Administration of the American Bar Association, I note with gratification your interest in the problem of timely disposition of cases—or, as you put it, "log jams"—in trial courts of metropolitan areas. Your piece calls attention most graphically to some of the problems confronting those responsible for the operation of such courts—developing docket systems capable of coping with the enormous number of cases, obtaining maximum use of judicial manpower, arousing public opinion in support of constitutional and legislative reform. As you illustrate by photographs of "the victims", it is all too true (as we judges often say) that "justice delayed is justice denied".

In view of your interest in this problem, I cannot help wondering why you have failed to touch upon several relevant matters about which I know your staff has been informed. Why, for example, do you exclude all reference to the current effective work of Presiding Judge Peck in New York, which has already made measurable inroads on the number of pending cases ready for trial? Why no reference to the major research program, instituted in 1948 by the working judges themselves, to undertake a thorough, objective and realistic analysis of the structure and operation of metropolitan trial courts? As you know, such a study was completed by a University of Michigan researcher after two years of work in the Detroit courts, and is the basis for similar studies now getting under way in half a dozen metropolitan areas.

Your article leaves your readers with the impression that negligence cases constitute the bulk of the log jam. From research already done, it is clear that what principally bedevils the average metropolitan trial judge is the enormous number of petty and personal problem cases that flood his court: divorce and small claims litigation, criminal prosecutions, juvenile and mental cases. Notice, moreover, that in adjudicating this class of cases judges are likely not to have the alert help of counsel on both sides (since many of such litigants are not represented by lawyers). Hence, the difficulty of arriving at socially and legally satisfactory decisions is often great. Yet your article, in its exclusive concern with the admittedly important time element in the problem of court administration, does not even glance at the *quality* element, which is crucial. If you want to light up the dark places of our legal institutions, why don't you deal with such urgent problems as the proper use of presiding and other specialized judges, the development of trained fact-finding and plan-making personnel as members of court staffs, methods of eliminating jurisdictional conflict between courts, and of obtaining maximum integration of court with court and of court with noncourt administrative agencies?

Another question is raised in my mind by the statement, found on page 131, that the American Bar Association "has classified 40% of our trial judges incompetent". No doubt this is a reference to a local current survey of the legal profession sponsored by the Association. It reflects the opinion of the Chicago public with reference to their own judges. It is not a classification of the American Bar Association.

Since one of your staff members recently spent several days in the Wayne County Circuit Court, of which I am Presiding Judge, I am particularly curious to know why you have eliminated all reference to this court, and to the techniques in use here by which we are dealing with the "log jam" problem. I refer to the pretrial practice through which we classify the cases as soon as they are filed to facilitate settlements, and if settlement is impossible, give immediate trial to "hardship" cases; and to the use of our Friend of the Court, administrative arm of the court, to secure first hand knowledge of the social and economic background of all of the domestic cases, thus assuring knowledgeable long-term safeguarding of the interests of the children. I do not claim that these devices, and others in use by presiding judges here and elsewhere, have solved all problems. But I do vigorously raise the question whether your writers, having been fully informed concerning some of these constructive efforts being evolved by those responsible for the judicial process, can be said to have dealt responsibly with their assignment.

Is not the primary responsibility of a free press to inform the public? We of the judiciary, I believe, should be able to count on the press for accurate, balanced descriptions of our problems, for discerning criti-

cisms of our performance, and for constructive suggestions for reform. If the press does not provide these staples of public discussion in a democracy, whatever reforms we get in our judicial and legal system are likely to be laughably inadequate.

I trust that *Life* will in due course give its readers the full and balanced treatment of our court problems that the importance of the subject merits.

IRA W. JAYNE
Chairman

Section of Judicial Administration
American Bar Association

Edward K. Thompson, the Managing Editor of Life, *replied to Judge Jayne in a letter dated February 12. Mr. Thompson said that Chicago was chosen because the situation in the courts there is "one of the worst" and that dramatizing a single, forceful "horrible example" was thought to be more helpful than setting forth "all the reform measures which have been adopted or are being tried".*

Mr. Thompson's letter also said that the statement that the American Bar Association had classified "40 per cent of our trial Judges incompetent" had been obtained from a member of the Association and acknowledged that "It is quite possible that the Association membership in general would not support use of such a figure".

The JOURNAL *reprints Judge Jayne's letter because of the importance of the subject and the interest* JOURNAL *readers naturally take in it.*

Blue and Gray Regional Meeting

(Continued from page 472)

sided over by George M. Morris, former President of the Association. Mr. Morris introduced Frank E. Holman, also a former President of the Association, who spoke on "Treaty Law and the Constitution". This address contained material not heretofore released by Mr. Holman in his addresses on this subject, and was in the nature of a reply to those opposing the position of the Association that a constitutional amendment is needed to protect against injury to domestic rights by treaties. Lawyer interest in this great constitutional issue was evidenced by the fine attendance at this session.

Those attending the "world affairs" program were given a first-hand account of the significant developments in the law that are taking place in the Far East by Robert G. Simmons, Chief Justice of the Supreme Court of Nebraska, in his address on "Law and Lawyers of the Far East". Judge Simmons recently completed a six months' tour of the Far East at the invitation of the Department of State. "The Organized Bar's American Citizenship Program" was presented by William C. Walsh, State Delegate from Maryland.

P. Warren Green, a member of the Board of Governors, presided at the luncheon on May 5, and introduced the guest of honor, William J. Jameson, President-Nominee of the American Bar Association, who delivered a most delightful talk on his approach to the great office he is soon to occupy. Kenneth B. Keating, Member of Congress from Rochester, New York, had been scheduled to speak but was grounded at Washington by adverse weather. In his address which then was released in mimeographed form he spoke of the over 100 congressional investigations now under way, defended them as essential to the work of Congress, and proposed certain limitations to eliminate abuses which have occurred. He referred particularly to the great value of the Department of Justice investigations, of which he was the chief sponsor. President Storey, called on to pinch-hit for Mr. Keating, made a magnificent address on "Communist Tactics", which proved to be one of the highlights of the entire program.

A well-attended breakfast on Tuesday, May 5, was sponsored by the American Judicature Society. George E. Brand, President of the Society, and Glenn R. Winters, Secretary, were the speakers. Each mentioned some of the accomplishments of that great organization in improving the administration of justice. Another breakfast, sponsored by the Legal Aid and Lawyer Referral Service Committees, was held on Wednesday, May 6. Again all registrants were invited and the speakers, Harrison Tweed, Member of the House of Delegates; Theodore Voorhees, Chairman of the Committee on Lawyer Referral Service; Orison S. Marden, Chairman of the Committee on Legal Aid Work, and G. Arthur Howell, Jr., all gave interesting and informative talks.

On Monday and Tuesday afternoons and on Wednesday morning workshop sessions were held. The ever popular "Trial Tactics" Panel was presided over by Walter M. Bastian, Judge of the United States District Court for the District of Columbia and member of the Board of Governors. The Plaintiff's Case was presented to an overflow audience of in excess of 600 lawyers on Monday afternoon with George E. Allen, Sr., of Richmond, Virginia, acting as Chairman. Panel members gave five-

minute outlines on assigned subjects, and then were questioned by the panel chairman on practical phases of their subject. Participants for the presentation of the Plaintiff's Case and their subjects were: "Pre-Trial Conferences with Witnesses", William Bruce Hoff, Parkersburg, West Virginia; "Selection of the Jury", J. Spencer Bell, Charlotte, North Carolina; "The Opening Statement", Leith Bremner, Richmond, Virginia; "Use of Pre-Trial Depositions", Robert Whitehead, Lovingston, Virginia; "The Direct Examination", Walton J. McLeod, Jr., Walterboro, South Carolina; "Demonstrative Evidence", Perry Nichols, Miami, Florida (he had a skull, bones, X-rays and other "demonstrative" exhibits which he displayed as he spoke); "Cross Examination of Expert Witnesses", Bernard M. Savage, Baltimore, Maryland; and "Arguments to the Jury", Theodore T. Sindell, Cleveland, Ohio.

The Defendant's Case was presented to an equally large audience on Tuesday afternoon. The panel and the topics discussed were as follows: "Use of Pre-Trial Depositions and Pre-Trial Conferences", James M. Guiher, Clarksburg, West Virginia; "Selection of the Jury", Charles E. Pledger, Jr., Washington, D. C.; "The Opening Statement", John G. May, Jr., Richmond, Virginia; "The Direct Examination", C. Richard Wharton, Greensboro, North Carolina; "The Cross Examination", Robert R. Parrish, Richmond, Virginia; and "Instructions to the Jury and Argument to the Jury", Welcome D. Pierson, Oklahoma City, Oklahoma.

Glen R. Dougherty, of Milwaukee, Wisconsin, the Chairman of the Defendant's Panel, died unexpectedly on Monday, May 4. His death cast a note of sadness. He was a great lawyer and a leader of the American Bar Association who will be greatly missed. Mr. Pierson took his place as Chairman for the Defendant's Case and did an outstanding job.

Another workshop session of great interest was Taxation Problems of the General Practitioner, sponsored by the Taxation Section of the American Bar Association. Thomas N. Tarleau, Chairman of that Section, presided. "Tax Aspects of Executives' Compensation", "Tax Problems Involved in Real Estate Transactions", and "Tax Problems in Separation and Divorce" were discussed respectively by Leo A. Diamond, New York City; H. Cecil Kilpatrick, Washington, D. C.; and David W. Richmond, Washington, D. C. A discussion panel followed the formal talks and was composed of Morton P. Fisher, Baltimore, Maryland; H. Brice Graves, Richmond, Virginia; William E. Jetter, Greenville, South Carolina; Leon L. Rice, Jr., Winston-Salem, North Carolina; and William A. Sutherland, Washington, D. C. Oral and written questions were presented by the audience and the Chairman in a discussion period enlivened by many pointed questions on tax consequences of everyday transactions.

Marcus A. Hollabaugh of Washington, D. C., presided over the session sponsored by the Antitrust Section. He introduced John H. Lewin, Baltimore, Maryland, who spoke on "To What Extent is The Rule of Reason Still Available as a Defense". Following Mr. Lewis was William Simon, Chicago, Illinois, who discussed "Meeting Competition Under the Robinson-Patman Act". Herbert A. Bergson, of Washington, D. C., spoke on "The Doctrine of Implied Conspiracy and Conscious Parallel Action Under the Anti-Trust Laws", while George B. Haddock, of the Antitrust Division of the Department of Justice, concluded the formal talks with an excellent discussion of "Exclusive Dealing Arrangements". Then followed the panel discussion in which William Poole, Wilmington, Delaware; Perry Patterson, Washington, D. C.; and Kenneth L. Kimble, Washington, D. C., took part.

The Legal Assistance Conference on that afternoon was presided over by Harry Shriman of Chicago, Illinois. A panel consisting of Emery A. Brownell, of the National Legal Aid Association; Major General E. M. Brannon, Judge Advocate General, U. S. Army; Colonel A. H. Rosenfeld, Jr., Chief, Army Legal Assistance, U. S. Army; Commander F. L. Forshee, Head, Legal Assistance Program Branch, U. S. Navy; Major General Reginald C. Harmon, Judge Advocate General, United States Air Force; and Commander C. R. Couser, Chief, Coast Guard Legal Assistance, U. S. Coast Guard, discussed the organization of legal assistance plans at national, state and local levels, referral procedures, basic policies, special problems and reference materials.

On Tuesday afternoon there were two sessions sponsored by Sections of the Association in addition to the trial tactics session. They were the sesssion on Real Estate, Probate and Trust Law, over which William A. Lane of Miami, Florida, presided; and Administrative Law, over which John W. Cragun, of Washington, D. C., presided.

Alex P. Gaines of Atlanta, Georgia, discussed Estate Planning at the Real Estate, Probate and Trust Law session. Mr. Gaines was followed by Furman Smith, Atlanta, Georgia, who gave some "Practical Suggestions for the Drafting of Wills"; and Emerson G. Spies, Professor of Law of the University of Virginia, who discussed "How Title to the Family Dwelling Should Be Held". The discussion panel was composed of R. W. Jordan, Jr., Richmond, Virginia; Charles B. Elliott, Columbia, South Carolina; Merrick I. Campbell, Norfolk, Virginia; Paul Hudgins, Bluefield, West Virginia, and John T. Manning, Durham and Chapel Hill, North Carolina. This session was one of the best attended of the meeting and unfortunately many were unable to get into the meeting room.

J. D. Bond, President of the Federal Trial Examiners Conference, spoke on "Use of Pre-Hearing Conferences by Administrative Agencies" at the Administrative Law session. His talk was especially timely in view of his recently announced appointment to the committee set up by President Eisenhower to study improvements in the field of administrative law. A question and answer panel on federal agency matters followed in which the

participants and their subjects were as follows: William A. Porter, Washington, D. C., radio, television and telephone; S. G. Tipton, Washington, D. C., aviation; Clarence A. Miller, Washington, D. C., Interstate Commerce Commission; Hans A. Klagsbrunn, Washington, D. C., emergency agencies; and John D. Conner of Washington, D. C., other federal agencies.

The "pretrial demonstrations" were presided over by Alexander Holtzoff, Judge of the United States District Court for the District of Columbia. Panel members were John J. Carmody, Washington, D. C.; J. Cookman Boyd, Baltimore, Maryland; Richard W. Galiher, Washington, D. C.; Joseph D. Bullman, Washington, D. C.; and James C. Toomey, Washington, D. C. After introductory remarks by Judge Holtzoff, the panel actually pretried three cases. This was a most informative and entertaining way of demonstrating the value of pre-trials.

Thomas E. Harris of Washington, D. C., presided over the Labor Relations Law session on Wednesday morning. The subjects of what should be the division of authority between state and federal governments in jurisdiction over labor matters and whether the Taft-Hartley Law should be amended on such matters as free speech for employers, non-Communist oaths, secondary strikes, boycotts and union security were discussed. Charles Gregory, Charlottesville, Virginia; Thomas Shroyer, Washington, D. C.; and Herbert S. Thatcher, Washington, D. C., were the main speakers and their views were supplemented by the Chairman and others in a very lively discussion.

T. Justin Moore of Richmond, Virginia, presided over the session sponsored by the Public Utility Law Section and introduced Francis X. Welch, who discussed recent developments in public utility regulation, and A. J. G. Priest, Charlottesville, Virginia, who discussed treatment of accelerated tax amortization for ratemaking and accounting purposes. While somewhat technical in character, this program was extremely well received and the papers presented are valuable contributions to this important field.

A highlight of the Mineral Law Section's Coal Program was a motion picture entitled "Powering America's Progress" produced by The March of Time. Thomas J. Michie of Charlottesville, Virginia, presided over this session. Robert E. Lee Hall, Chairman of the Coal Committee of the Mineral Law Section, spoke on "Coal and Foreign Competition"; James W. Haley, past Chairman of the Mineral Law Section, spoke on "Coal—Pacemaker in Legal Concepts". "Coal and Federal Emergency Regulations", was discussed by William A. Fullerton, Chief of the Solid Fuels Branch of the Rubber, Chemicals, Drugs, and Fuels Division of the Office of Price Stabilization.

The highlight of the entire meeting was the banquet on May 5 at which Harold E. Stassen, Director for Mutual Security, was guest speaker. Mr. Stassen spoke of his recent conference in Paris with the foreign ministers of NATO members and discussed the future of the program of that agency over a nationwide CBS radio network and all local radio stations. He declared that the United States must continue to work with other free nations to build strong defenses against aggression and to "create healthy and strong economies which will benefit the peoples of the free world". He put "trade" ahead of "aid" in a new approach to the problem of mutual security and United States aid to free nations. John S. Battle, Governor of Virginia, was the guest of honor at the banquet.

Many entertainment features combined to make the meeting a most pleasant experience for the attending lawyers and their ladies. Besides the "Get Acquainted" Reception on May 3, there were two other receptions, one on Monday, May 4, sponsored by the Bar Association of the City of Richmond and the Virginia State Bar Association, and one on Tuesday, May 5, sponsored by the District of Columbia Bar Association. On Monday night there was a well-attended dance, sponsored by the Junior Bar Conference of the American Bar Association, to which all registrants were invited.

The Regional Meeting of the American Law Student Association was held in conjunction with the Blue and Gray Regional Meeting with C. Anthony Harris, of Duke University, presiding. The subjects discussed were "Public Opinion and the Role of the Criminal Lawyer", "Is Big Government Bad?", "Wanted: A Proper Labor Policy", and "The Lawyer in Politics".

The ladies were quite delighted with the many events planned for their entertainment. Coffee hours were held on Monday and Tuesday mornings, tea and a fashion show on Monday, and tea and a show on fashions in home decorating on Tuesday. The ladies also attended the luncheon and the banquet. The trip to Colonial Williamsburg was enjoyed both by the ladies and the gentlemen. Particular highlights were the tours of the Capitol, Palace and Raleigh Tavern.

The great success of this meeting—and it was one of the most successful in Association history—goes to the great "team" effort of the Chairmen of Committees. In addition to Mr. Thompson, the Chairmen were: Thomas B. Gay, Advisory; Alexander W. Parker, Arrangements; John C. Williams and Melvin Wallinger, Reception and Distinguished Guests; W. L. Zimmer III, Entertainment; Horace H. Edwards, Banquet-Luncheons; David Meade White and Jack Russell, Registration and Membership; David J. Mays, Speakers (on May 4 he was awarded the Pulitzer Prize for his biography of Edmund Pendleton); Edward E. Lane, Transportation; David Nelson Sutton, Continuing Legal Education; and Lawrence F. Blanchard, Jr., Junior Bar. William J. McDowell served as Treasurer, with R. E. Booker and William T. Muse as Assistant Directors.

A full report on the well-attended and highly successful Missouri Valley Regional Meeting, held in Omaha April 30-May 2, will appear in the July issue of the JOURNAL.

Legal Education

(Continued from page 466)

year later covering the local law and the "how-to-do-it" type of material pertinent to the particular jurisdiction where the graduates expect to practice, after which, if they pass, they will be fully certified as members of the Bar.

2. All graduates who find employment in law offices and legal departments of corporations should be permitted to prepare themselves for this second examination as opportunity affords in their respective situations, but each employing firm or corporation should assume the duty of providing reasonable opportunity for such preparation. It is a fact, of course, that the graduate who is employed in a law office is not at once given responsibility for a client's affairs, but instead, he serves as law clerk and assistant for older members of the firm, picking up his know-how gradually as the months go by. The same is true of those who are employed in legal departments of corporations. These groups can be relied on to take care of their own preparation without in any way impairing the rights of clients.

3. All other graduates (and this would be about fifteen per cent of the graduating classes) should be required to prepare themselves by affiliation full time for the year with an Institute for Postgraduate Professional Education, to be established in each state under the auspices of the state Bar, preferably with the cooperation either of the state university law school or some other school or combination of schools in a position to render assistance.

4. This Institute should have as its principal function the education of recent graduates in the practical details of local law and practice, but in addition it can and should become a major "service" organization for the people of the state. It should supply legal aid in all the principal communities of the state. It should be used as the focus for the administration of lawyer reference plans. It should be used to render bill drafting and research service for the state legislature, for city councils, for boards of county supervisors. It should, for a reasonable price, render memorandum and briefing service to lawyers who find it necessary or desirable to employ such service in connection with their law practices. It should serve as a repository of legal talent to be called upon by the courts in appointing counsel to defend impecunious persons charged with crimes. Many other useful functions can be envisioned.

5. Co-operation of the law schools should be requested. With the help of schools short-term courses could be offered in some of the practical subjects involved—*e.g.*, examination of abstracts, preparation of tax returns, sale of the property of estates to pay debts. It should be made clear that the law schools cannot be expected to assume this added task without compensation. Budgets are limited and won't stand it without help.

6. There should be a branch of the Institute in each of the principal cities of the state, each branch to be in charge of a thoroughly competent member of the Bar (either full time or part time as the circumstances dictate) who will be responsible for assigning the tasks to and supervising the work of recent graduates in his jurisdiction, taking care that so far as possible each graduate is given a variety of practical experience so that by the end of the twelve-month period each will have had a good opportunity to become familiar with the practical details which the lawyer has to know. As supervisor he should also see to it that apprentices under his jurisdiction have opportunity to attend short postgraduate courses offered by co-operating law schools, lectures by leading members of the Bar, etc.

7. At the end of the year not only the neophytes who have been attached to the Institute, but also all others who have not yet passed the second and "how-to-do-it" examination, should be obliged to take the examination, after which, if they pass successfully, they can be certified as fully authorized to practice law in the jurisdiction.

8. How is this program to be financed? Of course, it will cost money. Supervisors will be expensive. Shall the graduates working in the Institute be compensated? If not, the burden on them will be severe, and probably too severe to be fair. Who will pay the compensation? Who will pay the supervisors? Who will pay for the necessary stenographic help and office rent, telephones, supplies, travel, etc.? An estimated budget for a state of 6,000,000 population would probably be in the neighborhood of $250,000 per year, this figure being based upon the employment of about twelve supervisors, full time, or the equivalent in part time, a like number of secretaries, and paying the graduate assistants $100 a month for services rendered. I suggest, although it may prove to be an unwelcome and unacceptable suggestion, that one half of this sum be paid by the Bar (probably by way of an annual fee of some kind) and the other half by the state general funds. Why should the Bar contribute to it? Because it is the Bar's obligation first, to take care of legal aid and second, to make reasonable contribution toward the development of the profession. The medical profession contributes generously to medical research. Why should the state contribute? Among other things because the legal aid work will pick up a most important part of the welfare burden.

9. Would such an arrangement be fruitful? It certainly would. It would give us legal aid, something that is very much needed today and something that is not being adequately developed in most places by presently existing means. Furthermore, it would be a superb opportunity for the Bar to render a public service. It would promote public relations of the Bar far more effectively than many of the other means that have been devised for that worthwhile purpose.

10. How much would it cost each

attorney? I would figure about $25 to $40 per year each, amounts which might be graduated according to years of active practice. Is that too much to expect of the Bar in discharging its duties to the public, to the legal aid problem and to the next generation of lawyers?

Is this a visionary plan? Apprenticeships are common enough in other countries, and they serve the good purpose of providing the "practical" training necessary for client care-taking. In England clerkships of two to five years in solicitors' offices are the rule. In Germany an apprenticeship of about three and one half years is required, with the time divided between courts, prosecutors' offices, notary and attorneys' offices and administrative offices, with modest maintenance paid by the state, at least in cases of need. In Switzerland a period of one year is required, in France two years, in Japan thirty-two months, in Italy approximately two years—in each instance (with the exception of Italy) with maintenance provided either by the state for services rendered in courts, prosecutors' offices, etc., or by the lawyers' offices for periods of time during which service is rendered such offices.

Let's have imagination enough to devise a plan of legal internship that will work for our own country. Let's not expect the impossible of the law schools. Is the Bar willing to put its shoulder to the wheel?

Class War and the Income Tax

(Continued from page 476)

on personal income reaching up to 92 per cent, this can no longer be answered by a sure negative despite the remark of Justice Oliver Wendell Holmes that "the power to tax is not the power to confiscate while this court sits". Justice Holmes is no longer on the Court.

Such is the war of ideas from which no human being on this planet is now exempt. The "war of the poor against the rich, a war constantly growing in intensity and bitterness" still goes on. As recently as March 21, 1951, the United Labor's Declaration of Principles said, "Record-breaking corporation profits and high-bracket personal incomes are not yet taxed high enough".

This is a history and not a program. Nor is it an appraisal of the social and economic impact of today's high corporate and personal income taxes on progress, incentive, the drying up of venture capital and inflation. There is also involved the survival of the American political system through the destruction of state and local governments by forced diversion of the incomes of their citizens—and sources of local tax revenues—to the Government at Washington, which is rapidly becoming the banker, guardian, job provider and mortgage holder of the American people. These consequences are ominous in the extreme, but space does not permit their discussion here.

But lest it be assumed that the writer would urge that the federal power in the field of taxation should now become a weapon in a new war of the rich against the poor, the following needs be said.

The total tax burden on the shoulders of the poor is too heavy now. It should not be increased. It should be reduced.

While the federal graduated or progressive income tax is not a crushing burden on the shoulders of our people earning $2,000, $3,000 or $4,000 a year, the burden of *all* taxes which they pay, directly and indirectly, is already too heavy, both in dollar amount and in the percentage of their earnings and the value of their property. No one can come to a just conclusion as to a course to be taken with respect to the federal income tax without considering the weight of *all* the numberless excise, property and other taxes paid by the poor which are levied by the federal, state and local governments under which they live.

It is this *total* tax burden placed on the backs of both rich and poor which must be considered. This point is too much overlooked by those concerned with federal progressive income taxes alone. It cannot be overlooked either from the standpoint of "equal justice under law" or from the practical political considerations involved in an attempt to reverse the increasingly confiscatory graduated federal income taxes on the abler and more successful members of the American community. An attempt merely to shift some of this excess burden from the backs of the rich and well-to-do to the backs of the poor cannot succeed.

Dr. Rufus S. Tucker in the *National Tax Journal* of September, 1951, estimates the total taxes paid in 1948 as a percentage of total income in various income brackets. A man and wife earning less than $1,000 a year are exempted from paying any federal income tax. But Dr. Tucker estimates that this poor family pays 18.7 per cent of their earnings in the various taxes that enter into their cost of living, or $187 out of a $1,000 income. Who will say they should pay more?

In the same *Journal* for March, 1951, Professor R. A. Musgrave, of the University of Michigan, contends that the sum of all taxes, federal, state and local, is not progressive but "regressive", *i.e.*, it takes more, in per cent of total income, from the very poor than from the rich. This conclusion has been widely propagandized. For reasons too numerous to give here, it has been sharply criticized by Dr. Tucker and others. Dr. Tucker believes the burden of indirect taxes bears less heavily on incomes below $2,000 and above

$7,500; that it falls heaviest on those in the $4,000 to $7,500 bracket.

However this may be, it is certain that the very poor are already heavily taxed in their food, fuel, clothing, etc., and that the problem cannot (and should not) be solved by a mere shifting of the tax burden to them. No system of justice can be devised for costs of government whose total is as high as ours in America today. The total is itself unjust.

The basic tax philosophy of this country has from the beginning been proportionate and not progressive. A poll tax is the same on every head. The general property or ad valorem tax or customs duty is the same on every $100 of assessed value of farm land or city homes or imported merchandise regardless of the wealth of the owner. The excise tax on cigarettes is the same on every package whether smoked by rich man or poor. The man who smokes two packs a day pays twice the tax as the man who smokes one. But that is his own free choice. It is not the strong arm of government.

Nevertheless, the progressive principle is pressing hard to enter the tax field so long governed by the proportionate principle. An excise or sales tax graduating upward with the amount of business done or the value of the article sold is an example. So is the proposed chain-store tax in which the tax per store increases with the number of stores.

The progressive or graduated principle is not directed against the dollar or property owned; it is directed against the man who owns it. Strictly, it is not a tax because it is not levied to pay only the legitimate costs of government. It is levied for other purposes. It is levied to redistribute the wealth of the nation, or it is levied for vengeance, as Mr. Cockran said. As soon as you levy a forced contribution to government for other purposes than to support the government *you engage in class war.*

The proportionate tax is levied against every dollar alike and treats every *man* alike. The rich man pays more than the poor man, not *because* he is *rich,* but because he has more dollars which government protects. This is "Equal Justice Under Law" —words inscribed over the portal of the Supreme Court of the United States.

The progressive or graduated tax permits *A* and *B* to combine their votes to rob *C.* It offers the demagogues in all parties a platform to climb to power by offering the ignorant and the indolent a chance "to vote themselves rich".

The economic consequences of the graduated tax are appalling. The moral consequences are worse.

Sir William Flinders Petrie, the great archeologist who knew much about civilizations that have died and men who have starved, said that democracies consume themselves through excessive and unjust taxation until they collapse and are succeeded by the Man on Horseback or the rank growth of the jungle.

It will be argued that an early return to proportionate income taxes would deflate our swollen budgets so sharply as to invite collapse. Then let it be done gradually. But bring federal taxes to the proportionate principle as quickly as possible.

If to accomplish this result, a political compromise is forced by those still bemused with the Communist Manifesto, let the graduated income tax be assigned to the states, if they choose to have it. Whatever may be said of such a compromise, it preserves the *vital power to resist* the growth of Big Government, by reason of the right of the overtaxed citizens or business to migrate to another state more hospitable to his industry. Under such an arrangement we could still hope to preserve "an indissoluble Union of indestructible States" and a society of free men.

The Cost of Justice

(Continued from page 458)

for a conference to consider (1) the simplification of the issues."

It seems to violate common sense to construe this rule as referring only to conferences held shortly before the trial when in most instances the issues must be formulated long before trial if adequate preparation for trial is to be made.

The idea of conferences shortly after the pleadings are completed is not new. In 1934, Judge George T. McDermott, of the United States Court of Appeals for the Tenth Circuit, discussed it in the *Journal of the American Judicature Society* (December, 1934). He said:

> Quite by accident . . . I stumbled onto a method of getting at the nub of a case at the beginning of the litigation instead of at the end. . . . I see no reason why a rule requiring a few minutes face-to-face conference between the parties, their counsel, and a trial judge, within a few days after a case is filed, shouldn't extend the practice to all cases in this country. . . . I first came onto the idea in some strike lawsuits brought to cloud the

title to producing oil leases. . . . Plaintiff's counsel never dreamed of winning; he did know the lessee couldn't drill without getting pay for his oil; so he figured, too many times correctly, the lessee would pay a substantial sum to release the pipe line runs. . . . Kansas lawyers struck upon the idea of filing an answer the day after the summons was served, and at the same time they served notice . . . of a motion for immediate trial, setting out the irreparable damage flowing from the delay. That brought the parties face to face with the trial judge immediately.

. . . When plaintiff's counsel appeared on the motion . . . he was put to the rack of the questions, 'Just what is your claim?' and 'Why not try it next week? These queries ended his effort to use the process of the court for extortion.

. . . You'd be surprised how many dilatory motions to make definite or to strike out can be disposed of by such a conference—even before they are filed. A lawyer with a trumped up case, unless it is a case founded on perjury, doesn't want to stand up and tell it to the judge. A defense lawyer with no weapon but delay has a bad half hour in such a conference. And in bona fide controversies, it shortens immeasurably the time for its solution to get at the crux of the case ten days after it is filed, instead of in the court of appeals *two* years later.

Conferences held well in advance of trial may not only result in the detection of strike suits and defenses not raised in good faith, but afford an opportunity to the court to dispose of practically all interlocutory questions at one time, and thus eliminate many motions. Such conferences do not necessarily eliminate the usefulness or wisdom of similar conferences held shortly before trial in which final and specific arrangements can be made to regulate the trial with substantial saving in its cost.

We now have data which show that from 60 per cent to 90 per cent or more of the cases pending in our courts are never tried. This means that most of them do not require a formal trial, that most people do not go to court to try their cases but to be helped to end their disputes in other ways.[8]

The disposition of the cases that are not to be tried can be accelerated by the methods described by Judge McDermott *(supra)*.

The Cost of Litigation in Terms of Human Hardship

Information as to this phase of the work of the courts is hidden away in the life stories of those who have turned to the courts for justice. Dickens made it the theme of *Bleak House* and Samuel Warren wrote of it in *Ten Thousand a Year*—stories that reached the heart of the English people and aroused their determination to obtain justice that gave more consideration to human values. They also aroused the bitter hostility of judges and lawyers, who, for years, fought improvement with every means they could command. This opposition failed in the end but it postponed for many years the measures which gave England the justice of which the present day judges and lawyers of England are so justly proud.[9]

Few, if any, American writers have been inspired to tell the public of the social consequences of contact with the courts. The conditions here in this respect are far better than in Dickens' day in England, but they are not what they should be.

Justice above all is a human thing. It must be tempered with understanding of all that is at stake. It must be arrived at, not alone by the application of inflexible rules and statutes, but also by a knowledge of what pending cases involve for those affected by them. This is one reason for the efforts which judges make to know the facts of the life of a person about to be sentenced, before sentence is imposed.

If we are to have justice in civil litigation, in many cases knowledge of these human factors is essential for the court, not after the case is tried, but soon after its aid is sought.

The cost of justice in human terms can be illustrated by many instances. Most New York papers of May 15, 1951, carried with real indignation a story of a woman 76 years old who sued to recover damages for injuries resulting from falling into a sidewalk opening in November, 1949. She was then in ill health. Her case could not be reached for trial until late in 1954. Her sole income was an old age pension. Her condition was such that there could be no assurance that she would be physically able to testify at the trial which could not be reached for over forty months. She applied for an early trial. Her application was opposed and denied.

In a case begun in December, 1939, in an eastern state, the plaintiff was injured by a falling ceiling. For twenty-two months after the accident he was unable to work. During this period, his only income was workmen's compensation of $28 a week. The case was reached for trial eight years later on November 12, 1947, and he obtained a verdict but the court set the verdict aside and dismissed the complaint. On appeal the order was affirmed, but the high court reversed and ordered a new

8. In the Supreme Court of New York which handles about 50,000 cases per year only about 10 to 12 per cent are ever tried. In the Massachusetts Superior Court for 1949, 13 per cent of 23,832 cases were actually tried. In the Michigan Circuit Courts for 1949 only 17 per cent of the 49,899 cases disposed of were actually tried. 41,417 never reached a courtroom.

The 1949 Report of the Administrative Office of the United States Courts shows that 8 per cent of the cases in these courts were ended by an actual trial, 1 per cent by the court during the trial and 9 per cent were disposed of by the court on contested motion before the trial, indicating that 82 per cent of all civil cases in these courts were ended by the action or inaction of the parties and not by the court itself.

9. See "Hundred Years' War for Legal Reform in England", by Professor Edson R. Sunderland of the University of Michigan, *Chicago Tribune*, June, 1926; reprinted in *The Consensus*, March, 1931, official organ of the National Economic League. It would be a real service to lawyers if these articles could be reprinted and made available to the younger members of the Bar who must solve this problem of the cost of justice.

trial on the ground that there was sufficient evidence to justify the verdict. The case required the services of thirteen judges. It was finally settled on February 1, 1950, ten years after it was started.

In the same jurisdiction, a case was begun in August, 1945, and ended in June, 1949, after three years, nine months. A brakeman was killed leaving the railroad yard at the end of his day's work. He left a 29-year-old widow and five small children. During these three years and nine months while she was waiting for a decision, the widow was forced to live on borrowed money and finally had to break up her home.

In the same state a case was started in April, 1943. The plaintiff had received permanent injuries while loading a truck. The case was finally settled in February, 1950, after six years and ten months. During this period his income was $25 a week from compensation which started eleven months after the accident. The trial court dismissed the complaint at the close of plaintiff's case. The first appellate court affirmed but the higher court ordered a new trial against one of the two defendants against which the plaintiff had brought suit. Another trial was had with two appeals and a final judgment finally secured. The services of twenty-six judges were used.

In February, 1945, in an eastern state a workman fell from an oil truck due to the breaking of a rope. He was 44 years old and had a wife and five small children. He sued for damages in March, 1946. Eleven weeks later he died from causes not connected with the accident. The case was brought in a rural county and a trial was had nine months later, the widow receiving a verdict of $35,000. The following June, on appeal, the judgment was set aside on the theory that the proof of causal connection between the breaking of the rope and the plaintiff's fall was insufficient. Some eighteen months later the high court restored the judgment, holding that there was sufficient proof and remanded the case to the first appellate court to reinstate the verdict. Three months later the defendant demanded a new trial on the basis of new evidence. In November, 1950, a new trial was ordered, and so, four years and eight months after this case was started, and although thirty-eight judges have already considered it, this litigation must be begun again. The plaintiff's attorney has argued at least six appeals, tried the case at once and must now try it again, and doubtless must argue further appeals. Probably also he has received no fee and may have incurred substantial out-of-pocket expenses.

A family consisting of a father, mother and two children lived in a tenement up a flight of stairs in one of our cities. One morning the father went to the street door to get a bottle of milk. On his way back he leaned on the stair rail; it broke, he fell and was killed. This occurred in 1939. In January, 1940, the widow brought suit. The trial was reached in January, 1944—four years later. Plaintiff recovered a verdict of $20,000. It was set aside. Eighteen months later, in July, 1945, an intermediate appellate court sustained the trial judge in setting the verdict aside. The high court reversed and directed a new trial. This occurred eleven months later and resulted in a verdict, October, 1946, of $30,000. The defendant appealed and lost, and finally, six years, nine months and five days after she began her action, the widow won her case. The services of fourteen judges (there would have been nineteen had not five of them heard the case twice on appeal), twenty-four jurymen, and five or more attorneys were used.

What these long months of waiting and the anxiety and expense have involved for the plaintiffs and their families in cases in which similar conditions have existed will never be known. It is clear that to let such things happen is a disgrace to the courts.

Responsibility for Present Conditions

A description of the efforts that have been made to improve the work of the civil courts and the results of such efforts would be interesting reading. In New York, for instance, in the past hundred years, between twenty-five and thirty commissions and committees, mostly legislative—a few created by the bar associations—have studied the courts of the state. Their reports fill over thirty thousand pages. The results, so far as the basic defects in the system are concerned, have been almost negligible although some of the most distinguished lawyers of the state have given devoted service to these efforts.

Reduction of the cost of justice is no easy problem. The average person takes no interest in the courts until he has occasion to use them, and as soon as that use ends, his interest also ends. Hence, the cost of justice is not likely to be reduced by the efforts of laymen.

Most corporations use the courts at one time or another. Some use them almost continuously. Corporations usually have ample resources and the know-how with which to attack this problem but they take little or no interest in it. They seem to regard the expense of litigation as of too little importance to do anything about it. If they are sued, delays often are an asset to them. To them the *status quo* is satisfactory. Apparently this is particularly true of the insurance companies, which defend most tort jury cases. They possess ample knowledge and resources to bring about improvement if they desired it, but we have yet to hear of serious efforts by them to simplify or improve court procedure or to reduce the cost.

We lawyers seem to possess a strange blindness as to the expense and hardship of litigation. We readily admit they are sometimes serious, but we say that we are merely using the methods which all our associates use and that we work under traditions, rules and conditions applying to all of us which we cannot change. "Too bad for the litigant," we say "but it can't be helped."

Tradition teaches us that our object should be not to end disputes in the simplest, least expensive way consistent with a proper decision or disposition of the issues, but to stage a contest, using every possible device and strategy which the rules afford to win. In this we may be sincere. The fault is not all ours. Part is in the system and the rules which all must use and in the traditions of the profession.

Probably the attitude of the lawyer to the administration of justice has never been more clearly and accurately stated than by Professor Sunderland in the articles referred to above (see note 9). He points out that the state has insisted upon keeping control of the mechanism for administering justice, making it a public monopoly, and rigidly prescribing rules to govern the practice of the courts and that as a result, all lawyers must learn the same rules, follow the same steps, use the same technical language and the same formulas.

The monopolistic nature of this situation, he says, has had a tendency to produce resistance to change. Lawyers can compete with one another only within the limits of these rules, which they do not make. No one can outbid his competitor by offering novel remedies or better methods. There is no particular incentive to work for new rules, for this problem is normally outside the scope of professional activity. Individual success in practice suffers no apparent loss from the use of a defective system, because the handicap operates equally upon all competitors.

"Accordingly," says Professor Sunderland, "immediate self-interest offers no convincing reason for leaving familiar paths and undertaking a struggle with new problems. . . . Not until inefficiency reaches a point where it threatens to drive away business does the unreasoning group instinct scent danger and prepare to assume the burden of inevitable reforms."

He ends this statement with the question whether or not the public will force a better technique on the Bar "or compel the Bar, in order to escape that calamity, to co-operate with it in the development of a more adequate system of practice. Or will the Bar take the lead and with a social vision which recognizes the ultimate identity of interest between the contending groups admit the justice of popular complaints, emancipate itself from the petty tyranny of stereotyped ideas, and cheerfully assume

whatever temporary burdens may result from a reconstruction of procedural processes."

The Cost of Justice Can Be Reduced

Our courts have an "inherent power to provide themselves with appropriate instruments required for the performance of their duties".[10] Yet for some reason very few of them have employed this power to reduce the cost or hardships of litigation through supervision of the use which is made of their facilities. It may be that it has not been used because until recently no practical method of doing so has been recognized. We know now, however, that a court can regulate and supervise the use of its facilities through conferences held by a judge with the attorneys for the parties to a lawsuit (and the parties themselves if they so desire). In such conferences, it is possible to discuss practically every phase of the case, including preparation for trial and, to quote again Rule 16 of the United States District Courts, anything that will "aid in the disposition of the case". It has been found that, to an amazing degree in such conferences, the preparation for trial and the trial itself is simplified and shortened, and, what is equally important, the work of the judges both before and during the trial is reduced substantially.

In such conferences, each of the parties must explain its contentions to the court, and often motions, depositions and the like can be eliminated and pleadings amended; and the court is able to supervise the use which is made of its facilities under the adversary system and to forestall their misuse.

In court year 1950-51 the Third Judicial Circuit Court of Michigan at Detroit assigned twelve judges to trial work. They disposed of 769 law cases and 610 chancery cases by trials. During the same year one judge assigned to jury cases disposed of 1,284 cases by conference procedure and another judge assigned to chancery disposed of 3,934 cases by this method. Chief Judge Ira W. Jayne of this court states that these figures represent about the average for the past five years. This court is now holding such conferences in all cases soon after issue is joined and a few other courts are doing the same.

The Supreme Court of New York is one of original and general jurisdiction—not an appellate court. In 1949 this court assigned two of its judges in New York County to call into conference pending tort jury cases, with the single purpose of eliminating those that could be settled. These conferences were held in chambers. In thirty months ending June, 1950, 8,690 such cases were ended in this way.

This procedure has been criticized as denying to litigants the benefits of a formal trial and as forcing settlements. If those who entertain such belief were to sit with one of the judges conducting these conferences there is every reason to believe that their doubts would disappear, unless they are of the opinion that the function of the court is to dispose of pending cases only by trial, and that it is not its duty to dispose of them just as quickly, simply and inexpensively as possible without trial wherever that is reasonably and fairly possible.

In 1949 also, the same court, in Kings County (Brooklyn) began the use of what it calls its "Calendar Classification and Control System". Under this procedure, pending jury tort negligence cases are called for a hearing in open court. Plaintiff is required to submit a copy of the pleadings, a bill of particulars and an affidavit of a doctor as to plaintiff's injuries. After hearing counsel and examining these papers, the judge determines whether or not the claimed damages are likely to be an amount within the jurisdiction of one of the lower courts. If so, he requests counsel to consent to a transfer to such court. If such consent is refused, the case may be placed on a deferred calendar.

When the system was instituted the call began with the cases nearest trial and proceeded backward on the calendar. Today cases are being considered which will not be reached for trial for many months. This is significant in view of the rather generally held idea that such conferences can be effective only when held on the eve of trial. They usually require but a short time and in many instances result in settlement. Frequently, although the case is held for trial, a settlement is reached outside the courtroom after the hearing, perhaps the same day. A typical day may be taken at random. On May 1, 1950, eighty-seven cases were put on the calendar for that day. Of these, twenty-two were adjourned; twenty were settled; sixteen were transferred to the City Court on consent; twenty-nine were retained on the general calendar for trial.

One watching these hearings looks in vain for any suggestion of anything but co-operation on the part of the Bar. In one year, using this system, one judge disposed of more

10. Brandeis, J., *Ex parte Peterson*, 253 U. S. 300 (1919).

than twice as many cases as all the rest of the court taken together disposed of by trial and in this court there are usually seven or eight trial judges at work.

In April and May, 1951, two judges of this court disposed of 2,922 cases in conferences called under this Classification and Control System.

"Wouldn't it be good if we separated the wheat from the chaff, disposed of ninety per cent of these cases by compromise, conciliation, good sense and sound reason, and left the courts reasonably free to try the remaining cases in dignity and thus preserve our traditions and the proper atmosphere of the court? I am for that. But if we are to preserve our courts, if we are to preserve our judicial system, if we are to bring to an end the ever continuing and ever threatening whittling away of the influence and jurisdiction of the courts, all of the governmental agencies, insurance companies, and trial bars must unite together to work with the courts for an intelligent disposition of causes by conciliation and fair compromise where possible, and the courts, too, must earnestly join in this mutual effort."[11] But if we are to judge the future by the past it must be said that there is very little likelihood of seeing any such unity of effort.

Is a New Day at Hand?

In the *New York Times Supplement* of July 1, 1951, Judge Paul Alexander of the Domestic Relations Court in Toledo, Ohio, writes of a plan sponsored by the American Bar Association for handling divorce problems. He speaks of it as "a healing process". He says that most husbands and wives who seek divorce "are heartsick" over their failure to agree and adds: "In this upset state they turn to the law for help. But the ponderous, judgmental, heavy-handed law gives them not help—but hell . . . as if they had not had enough bickering and battling, the law intensifies their antagonism . . .. we lawyers call this 'adversary litigation'."

The significance of this language of Judge Alexander is not confined to divorce cases. It is suggestive for other cases as well, for civil cases often involve hard feelings and deep antagonism; and when the parties have sought the help of the law they have often been relegated to the heavy-handed processes of adversary litigation, which in these cases, as well as in divorce actions, often results in intensification of antagonisms and ill-feeling. In addition, it may involve the parties in expense and hardships which often they can ill afford or endure and in heartaches which may last for a long time.

But there may be light ahead. The conferences held while cases are pending referred to above, may very well be characterized as "a healing process", for in them the atmosphere of battle and struggle, of controversy and antagonism, which so often obtains in the courtroom, can be and usually is replaced by one characterized by friendliness, by willingness to recognize facts which are known to be facts and by co-operation in simplifying the disposition and ending of the dispute—a healing process.

May it not be possible that in the development of this conference procedure a new function and opportunity for our judges will emerge? Perhaps no longer will they serve largely as umpires presiding over legal battles. Perhaps more and more they will use their prestige, their influence, their authority, their wisdom and their humanity to heal the differences that separate those who come to their courts seeking aid. Especially is this possible with respect to thousands of cases which trained judges and lawyers know involve far too little to warrant the use of the ponderous, expensive facilities of a jury trial or indeed of any formal trial at all or to justify counsel preparing them for trial and trying them. Many such cases can be ended soon after they are started, without trial, always preserving the right to trial for all who wish one. Such procedure is not theoretical; its practical usefulness has been established in many cases and in various courts. By its use the cost of justice to many in both human and financial terms can be definitely reduced.

11. David A. Benjamin, Justice, City Court of New York: 9 *Bar Bulletin New York County Lawyers Association.*

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